148 U.S. 31

Supreme Court U. S.
FILED.
JAN 9 1893
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States,

OCTOBER TERM, 1892.

THE UNITED STATES,
APPELLANT,
*vs.*
THE CALIFORNIA & OREGON LAND COMPANY.

*No.* 1073.

**Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.**

## BRIEF FOR APPELLEE.

A. T. BRITTON,
A. B. BROWNE,
*Attorneys for Appellee.*

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

# Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,

*vs.*

THE CALIFORNIA AND OREGON LAND COMPANY.

*No.* 1073.

## Brief for Appellee.

### STATEMENT.

The defendant company is the present owner of the lands granted by Congress in 1864 and 1866 to the State of Oregon to aid construction of a wagon road from Eugene City across the Cascade Mountains to the eastern boundary of that State.

This suit is brought by the United States, pursuant to an act of Congress approved March 2, 1889 (25 Stats. 850), to determine the right of the Government to forfeiture of the grant and recovery of the title. The gravamen of the bill is (1) failure to construct the road, (2) the alleged fraudulent acts of the agents and representatives of the Oregon Central Military Road Co. (the immediate grantee of the State and grantor of defendant) in procuring from

the Governors of Oregon certificates showing construction and completion of the road (the sole evidence prescribed by the granting act), and (3) alleged knowledge of such fraud on the part of the subsequent individual purchasers of said grant and this appellee company, organized by them to hold and manage the property, and all of whom are made original parties defendant to this bill.

Special pleas in bar were filed by the appellee Company:

1st. DENYING FRAUDULENT CHARACTER OF THE GOVERNOR'S CERTIFICATES OF CONSTRUCTION OR PARTICIPATION IN, KNOWLEDGE OR NOTICE THEREOF, BY ITSELF, OR ITS CONSTITUENT PURCHASERS, OFFICERS, OR AGENTS; AND

2d. DEFENCE OF PURCHASE IN GOOD FAITH AND FOR VALUABLE CONSIDERATION.

Argument was had in the Circuit Court upon the sufficiency of these pleas; same were sustained and the bill dismissed (Rec. 98).

On appeal, this Court (140 U. S. 599) refused to consider the merits of the case or pleas presented, because finding that the United States had neither plead to nor joined issue upon the pleas, and that no testimony had been taken in their support. On this single ground the case was remanded to allow the Government "to reply to "and join issue on the pleas." (Mandate, Rec. 100.)

This has been done; issue joined by proper replication upon the pleas as made; proof fully sustaining the pleas has been made, and after full hearing the Circuit Court has entered decree again dismissing the bill, finding thereon (Rec. 133):

"That the certificates of the Governor of Oregon de-
"claring the road mentioned in the bill to have been
"duly constructed were truthfully made, without fraud
"or misrepresentation on the part of any one; and that

" said defendant, the California and Oregon Land Co., is
" the purchaser of the land described in said bill from the
" Oregon Central Military Road Co. in good faith, for a
" valuable consideration, and without notice of any fraud
" or misrepresentation on the part of said Oregon Central
" Military Road Co. or any one else."

The Circuit Court of Appeals has affirmed this decree (Rec. 316), and the United States now appeal to this Court.

The pertinent facts are :

THE GRANT.

By act approved July 2, 1864 (13 Stats. 355), Congress granted to the State of Oregon *in præsenti* to aid construction of a wagon road from Eugene City across the Cascade Mountains to the eastern boundary of that State

" Alternate sections of public lands, designated by odd
" numbers, for three sections in width on each side of said
" road."

By act approved December 26, 1866 (14 Stats. 374), Congress enlarged the grant to six sections in width, and authorized selection therefrom, in lieu of lands found otherwise disposed of in the original grant, and to supply any deficiency in the quantity thereof.

By act approved October 14, 1864, the Legislature of Oregon conferred the grant (with all future Federal aid) upon the Oregon Central Military Road Co., a corporation theretofore organized under the laws of said State for the purpose of building said road.

By section 4 of the grant of 1864 it was provided that the lands granted should be disposed of thus:

"That a quantity of land not exceeding 30 sections for "said road may be sold; *and when the Governor of said "State shall certify to the Secretary of the Interior that "any ten continuous miles of said road are completed*, then "another quantity of land hereby granted, not to exceed "thirty sections, may be sold, and so from time to time "until said road is completed; and if said road is not "completed within five years, no further sales shall be "made, and the land remaining unsold shall revert to the "United States."

By act approved March 3, 1869 (15 Stats. 338), Congress extended the time for such completion to July 2, 1872.

July 27, 1866, the Governor of Oregon certified under the seal of said State, and from his personal examination, that 50 miles of said road beginning at Eugene City had been completed "in accordance with the requirements of "said act of Congress and the laws of Oregon" (Rec. 7).

November 26, 1867, the Governor further certified, under the seal of the State, that an additional 42½ miles extending from the termini covered by the former certificate "having been carefully inspected and found to be well "and faithfully built, and fully up to the requirements of "the law, therefore the same is approved and received" (Rec. 8).

January 12, 1870, the Governor certified, under the seal of the State, that the entire road shown on an accompanying map "has been completed as required" by the Federal and State acts of 1864, *supra*, and specifically recited therein (Rec. 10).

At various dates between November, 1867, and April, 1873, inclusive, the Secretary of the Interior certified to the State some 361,000 acres as properly enuring under said grant, each certification reciting:

"And, further, it is shown by the certificate of the Gov-
" ernor of said State, bearing date January 12, 1870, that
" said Oregon Central Military Road has been completed
" from Eugene City to the eastern boundary of said State."
Rec. 19–43.

June 18, 1874 (18 Stats. 294), Congress further enacted as follows:

" Whereas certain lands have heretofore, by acts of Con-
" gress, been granted to the State of Oregon to aid in the
" construction of certain military wagon roads in said
" State, and there exists no law providing for the issuing
" of formal patents for said lands: Therefore,
" *Be it enacted by the Senate and House of Representa-*
" *tives of the United States of America in Congress assem-*
" *bled*, That in all cases when the roads in aid of the con-
" struction of which said lands were granted *are shown by*
" *the certificate of the Governor of the State of Oregon, as*
" *in said acts provided, to have been constructed and com-*
" *pleted*, patents for said lands shall issue in due form to
" the State of Oregon as fast as the same shall, under said
" grants, be selected and certified, unless the State of
" Oregon shall by public act have transferred its interests
" in said lands to any corporation or corporations, in
" which case the patents shall issue from the General
" Land Office to such corporation or corporations upon
" payment of the necessary expenses thereof: *Provided*,
" That this shall not be construed to revive any land
" grant already expired, nor to create any new rights of
" any kind except to provide for issuing patents for lands
" to which the State is already entitled."

Thereunder, on July 10, 1883, and July 15, 1884, patents were issued to the Oregon Central Military Road Co. for 40,363.82 and 549.42 acres respectively of additional lands (Rec. 44–52), each patent containing the same recital as to the fact and evidence of completion of said road as set forth in the certified lists, *supra*.

## Sale and Conveyance of the Grant.

January 13, 1872, the Wagon Road Co. submitted to Messrs. Mitchell & Dolph, counsellors, of Portland, Oregon, its chain of title to this grant, for their "opinion "as to the validity and present condition of such title" (Rec. 286).

Thereon Messrs. Mitchell & Dolph rendered full opinion, reciting the grants to and from the State and their legal effect, the fact and effect of the Governor's certificate of construction, and advised that—

"Your company has unquestionably the absolute right "to dispose of the whole or any portion of its lands "under said grants at such times, in such manner, and "upon such terms as the company may determine, and "the purchaser will acquire the same right of selecting "and listing the unsurveyed portions of the grant that "your company now has.

"As fast as the road was completed and accepted, and "the Governor's certificate of acceptance filed in the De-"partment of the Interior of the United States, the con-"dition of the grant was complied with, and your com-"pany took the absolute fee to such lands as it was "entitled to receive under the grant, with the immediate, "unqualified right of disposal" (Rec. 309–312).

Numerous decisions of this Court have since firmly established the correctness of this opinon.

In May and October, 1874, and through the intermediate conveyance to and from one Pengra, its agent and representative, the Wagon Road Company sold the entire grant by undivided moieties under each conveyance to a large number of individual purchasers, all residents of California, for the consideration of two hundred thousand dollars in gold coin. These deeds appear at large in the record (pp. 53–67). That the consideration named

was actually paid is established beyond question by the testimony more fully recited hereafter, with the circumstances attendant thereon.

Finding individual ownership in unequal interests to be embarrassing in the practical management of such a large and distant property, such purchasers organized the California and Oregon Land Co., under the laws of California, for such convenient care and management, to which company the entire title was conveyed in 1877, the purchasers receiving the stock of said company proportioned to their individual interests in the land conveyed. This deed appears in the record (pp. 68–73).

This was the condition of title when, with preamble reciting the memorial of the Oregon Legislature questioning the construction of this road (and others) in whole or in part, Congress by act approved March 2, 1889 (25 Stats. 850), directed suits by the United States against all interests, individual or corporate, therein, and for the purpose as therein expressed :

"To determine the questions of the seasonable and " proper completion of said roads in accordance with the " terms of the granting acts, either in whole or in part, " *the legal effect of the several certificates of the Governors* " *of the State of Oregon of the completion of said roads*, " and the right of resumption of such granted lands by " the United States, and to obtain judgments, which the " court is hereby authorized to render, declaring forfeited " to the United States all of such lands as are coterminous with the part or parts of either of said wagon-roads " which were not constructed in accordance with requirements of the granting acts, and setting aside patents " which have issued for any such lands, saving and preserving the rights of *all bona fide purchasers of either* " *of said grants or of any portion of said grants for a* " *valuable consideration, if any such there be.* " *Said suit* " *or suits shall be tried and adjudicated in like manner*

" *and by the same principles and rules of jurisprudence as* " *other suits in equity are therein tried*, with right to writ " of error or appeal by either or any party as in other " cases."

## THE PLEADINGS.

The bill makes defendants the Oregon Central Military Road Co., B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company.

It avers in detail the grant by Congress; its bestowment on the Wagon Road Co.; the certificates of the Governors certifying construction and completion of the road; the certification and patenting of the lands by the United States; the sale and conveyance of the grant to Colby *et al.*, and by them to the defendant Land Co.

It charges:

1st. Failure to construct or thereafter maintain the road, claiming failure to comply with certain details of construction as required by the general law of Oregon.

2d. Fraud on the part of the Wagon Road Co. in obtaining certificates of such construction from the Governors of Oregon upon false and fraudulent representations as to the construction of the road.

3d. That the fact of non-construction and non-maintenance of the road and the fraudulent representations alleged were known to all the defendants.

It prays decree:

1st. Declaring forfeiture of the entire grant.

2d. Cancelling the Government's certifications and patents and the deeds of conveyance *inter partes* described *supra*.

3d. Declaring void the Governor's certificates of construction.

Rec. 2–18.

Exceptions were taken by the defendants Rideout *et al.* (individual purchasers from the original Wagon Road Co.) and the Land Company—

(1) To the averment that the road was required to be constructed in accordance with the cited law of Oregon, or

(2) To be *maintained* after construction to fulfil any conditions of the grant.

On hearing, these exceptions were sustained.

Rec. 79–80.

By leave of Court (Rec. 78–80) special pleas in bar were filed.

They are in substance:

1st. That the certificates of construction were made by the Governors of Oregon honestly and in good faith and without wrongful procurement or fraud.

2d. That the individual defendants purchased the grant in good faith for a consideration of $200,000, fully paid, placing confidence in the truth of such certificates and in the certified lists of lands theretofore issued by the Secretary of the Interior, without knowledge, notice, or reason to suspect existence of any of the frauds or fraudulent acts alleged in the bill.

3d. That the California and Oregon Land Company was organized by said purchasers for the more convenient handling and care of the property, to whom they conveyed in 1877, receiving stock therein in exchange, and that neither the officers nor agents nor stockholders of said company had any knowledge, notice, or reason to suspect the frauds now alleged.

4th. That said purchasers and said company have, since such purchase, expended in the care of the property and taxes thereon some $127,000, and received in sales and rents therefrom about $14,500.

5th. That other persons have purchased the stock of said Land Company, prior to this suit, relying upon the certificates of construction; the certification of the lands; the act of Congress of June 18, 1874, authorizing issue of patents; have paid various sums up to $20 per share in good faith and without knowledge, notice, or reason to suspect any of the frauds alleged, and that the 20,000 shares of the company's stock are now held by twenty-five stockholders, of whom only eight were originally stockholders in said company or are defendants in this suit.

Rec. 81–86.

Answer was also filed fortifying the pleas (Rec. 87–97; amended answer, Rec. 119), and in consonance with the pleas, the especial defence being that the defendants so purchased in rightful reliance upon the Governor's certificates of construction and the official recognition thereof and in perfect good faith, without notice, knowledge, or reason to suspect existence of any fraud or wrong-doing and denying the same.

Replication to the pleas and answer was duly filed as recited *supra* (Rec. 104).

## ARGUMENT.

The questions presented by this record are—

### FIRST.

THE NATURE OF THE GRANT, AND HEREIN THE LEGAL EFFECT OF THE GOVERNOR'S CERTIFICATES OF CONSTRUCTION.

### SECOND.

THE TRUTH OF THE PLEAS AND THEIR SUFFICIENCY AS MATTER OF LAW TO BAR THE RELIEF PRAYED BY THE GOVERNMENT'S BILL, AND HEREIN—

(*A*) THE INTEGRITY OF THE GOVERNOR'S CERTIFICATES OF CONSTRUCTION.

(*B*) THE DEFENCE OF BONA FIDE PURCHASE.

## I.

## THE SCOPE OF THE INQUIRY.

It was contended below, and doubtless will be here, that the act of Congress directing this suit and the former decision of this Court herein (140 U. S. 599) require full investigation upon the FACTS of construction, regardless of the sufficiency of the pleas, if proven, to bar the relief prayed. This contention is unsound.

Without the act in question the Attorney-General had full general authority, which has been many times exercised, to bring suit to declare the certificates of the Governor void because of alleged fraud in their procurement, and to set aside all patents or certifications based thereon.

*United States* v. *San Jacinto Tin Co.*, 125 U. S. 273.

The act of 1889 simply ordered what the Attorney-General had theretofore full power to do, and directed that the question of the Government's right of forfeiture of the grant for failure to construct the road should also be raised and determined.

The bill is filed in the ordinary way, and in its substance and prayer for relief is founded solely on the general ground of fraud; to be effective and reach the conscience of the present holders of the title, knowledge of such frauds is imputed to them.

To such bill the defendants might have demurred, and raised thereby the question whether the Governor's certificates of construction were not conclusive of the title; or, further, that whilst the bill prayed forfeiture of the entire grant, the first thirty sections were given absolutely and without condition of construction or otherwise, and hence the title thereto was perfect in every view. Such contention would be and is unanswerable, for this Court has so construed a precisely similar provision in *Railroad Co.* v. *Courtright* (21 Wall. 310). Or by plea averred, that upon the faith of this prescribed statutory proof of construction, they had purchased in good faith and for value, and were hence fully protected from discovery of the fraud alleged.

The act of 1889, therefore, did not substantially enlarge the judicial remedy, nor change the ordinary course of procedure, pleading, and proof. Congress *directed* suit to determine the questions *prima facie* involved, but in so doing it was careful to preserve in express terms the rights of *bona fide* purchasers; a provision which, whilst clearly expressing its desires, neither added to nor diminished the jurisdiction of the courts over the controversy, nor changed the established course of judicial procedure. If the legal effect of the Governor's certificate was therein

held as matter of law to be conclusive, and a complete bar, it is manifest no inquiry into the facts was necessary or authorized. Or if the plea of *bona fide* purchase for value was sustained in law and proven in fact, no further inquiry into the fraud alleged was pertinent or of any possible avail.

It needs only the suggestion at this bar that when the United States enters the Courts of the country they stand upon the footing of a private suitor, and are subject to all the rules of pleading, procedure, and proof which are applied between individual suitors. Hence the Act must be treated solely as the expression of legislative intent that suit should be brought and conducted by the rules of equity, in the ordinary way and subject to judicial decision how far the questions sought to be determined were concluded as matter of law by the legal effect necessary to be given the Governor's certificates, or by plea and proof establishing existence of *bona fide* purchasers, present holders of the legal title, whose rights could not be disturbed. On any other construction, Congress would be open to the charge that notwithstanding the judicial nature of the remedy invoked and the plain subjection of the United States thereto, yet all such established principles of equity procedure must be arbitrarily swept aside, and all questions of fact be opened to investigation herein, regardless of principle, precedent, or right. That conclusion is not admissible.

The judicial remedy and defence is of the essence of all property right. The rules of judicial procedure, pleading, and proof are engrafted upon it and always present, and by them the sovereign and the citizen are equally bound.

As between individuals the case stated by this bill when met by the pleas here interposed in bar, substantiated as

they are by complete proof, would compel decree of dismissal, and this upon the twofold ground:

1. THE ACT OF THE GOVERNOR AS THE CHOSEN AGENT OF THE PRINCIPAL, ON WHOSE CERTIFICATE OF CONSTRUCTION—AS THE ONLY AND FINAL AUTHORITY—THE RIGHT TO SELL THE LAND GRANTED WAS EXPRESSLY BASED; AND

2. PURCHASE ON THE FAITH THEREOF, FOR VALUE, AND IN GOOD FAITH, WITHOUT KNOWLEDGE OR NOTICE OF THE FRAUD HERE ALLEGED.

And although Congress may have desired to here test the *fact* of construction, enforcement of that desire through the judiciary cannot be had, if at the threshhold of the case it is found that upon the faith of the Governor's certificates of construction individual's rights have been acquired in good faith and for value superior to the equity set up by the United States.

The rights of such *bona fide* purchasers to be saved and preserved by the express provisions of the Act are those which relate not alone to the *title* involved but to the mode of procedure, pleading, and proof. Such purchasers cannot be subjected to the delay, expense, and annoyance of investigation into the facts of the alleged failure to construct this road, if such defence, interposed by special plea, be established by requisite proof. For as this Court said in *Colorado Iron Co.* v. *U. S.* (123 U. S. 307, 313)—

" It follows that to a bill in equity to cancel the patents " upon these grounds alone *the defence of a bona fide pur-* " *chaser for value without notice is perfect.*"

In *Farley* v. *Kittson* (120 U. S. 303, 314) this Court said:

"But the proper office of a plea is not, like an answer, "to meet all the allegations of the bill; nor like a demur- "rer, admitting those allegations, to deny the equity of "the bill; but it is to present some distinct fact, which *of* "*itself* creates a bar to the suit, or to the part to which the "plea applies, and thus to avoid the necessity of making "the discovery asked for, *and the expense of going into the* "*evidence at large*. Mitford Pl. (4th ed.) 14, 219, 295; "Story Eq. Pl. secs. 649, 652."

And the Court therein cites with approval the opinion of Lord Redesdale in the House of Lords in *Roche* v. *Morgell* (2 Sch. & Lef., 721, 725–727), that—

"A plea was a special answer to a bill, differing in this "from an answer in the common form, as it demanded the "judgment of the Court *in the first instance*, whether the "special matter urged by it did not debar the plaintiff "from his title to that answer, which the bill required. "If a plea were allowed, nothing remained in issue be- "tween the parties, so far as the plea extended, BUT THE "TRUTH OF THE MATTER PLEADED."

And also the decision in *Stead* v. *Course* (4 Cranch, 403–413) by Chief-Justice Marshall:

"In this case the merits of the claim cannot be ex- "amined. The only questions before this Court are upon "the sufficiency of the plea to bar the action, and the "sufficiency of the testimony to support the plea as "pleaded."

Equally unsound is the contention that this Court by its former decision (140 U. S. 599) directed inquiry into the primary facts as to construction of this road.

Following the familiar rule, expressed by this Court in *Farley* v. *Kittson*, *supra* (p. 314), that where the plaintiff "sets down the plea for argument, he thereby admits

" the truth of all the facts stated in the plea, and merely " denies their sufficiency in point of law to prevent his " recovery," the Circuit Court sustained the pleas as sufficient to bar the relief prayed, and thereon dismissed the bill.

On the appeal, the United States assigned for error, *inter alia* (Brief, p. 48)—

"(9) The Court erred in refusing to allow the com- " plainant to reply to the respective pleas, *so as to try the* " *truth of the allegations made.*"

It was on this ground alone that this Court reversed the Circuit Court's decree, and, as its mandate declares, (Rec. 100) only " in so far as it dismisses the bill," and remanded the cause " with a direction to allow the plain- " tiff *to reply to and join issue on the pleas.*"

The effect of this proceeding is plain. The opinion and decree of the Circuit Court, in so far as it held the pleas sufficient in law, stood unreversed, and by the mandate of this Court the United States secured the privilege (sought under the assignment of error, *supra*) " to reply to " the respective pleas *so as to try the truth of the allega-* " *tions made.*"

There is nothing in the opinion of this Court which abridges or enlarges the scope of the order as expressed by the mandate. Joinder of issue on the pleas, *ex necessitate*, left operative upon the case the rules of equity practice, and principles of adjudication heretofore announced by this Court, and repeated *supra*. In other words, the sufficiency of the pleas to affect a bar to the Government's bill was the issue of law settled by the decree below, and the *truth* of the matters set out in the pleas was the issue of fact involved and THE matter sent back for hearing.

Language of this Court may perhaps be found in the opinion which, standing alone, would give faint color to the contention now made *contra*, but at p. 616 the Court holds that the plaintiff had the right to join issue and try the truth of the pleas after the Circuit Court had held them sufficient in law to bar the relief prayed, and at pp. 631, 632, it observes that the important interests involved and the investigation ordered by Congress cannot thus "be determined upon the *untested* allegations of the de-"fendants." The plea of laches is overruled, but the substantive, controlling intention of the Court is expressed at the conclusion of the opinion thus (p. 634):

"To prevent any misapprehension we state that we do "not intend to determine any question as to the contro-"versy between the United States and the claimants of "the lands, but reverse the cases that their merits may "be investigated. Decrees of this Court will be entered "in accordance with the foregoing directions."

When, then, the mandate herein directed that the Government should "reply to and join issue on the pleas," there was raised on such joinder of issue nothing "BUT "THE TRUTH OF THE MATTER PLEADED."

*Roche* v. *Morgell*, *supra*.

*Farley* v. *Kittson*, *supra*.

Hence the sufficiency of the pleas to bar the action, and the sufficiency of the testimony to support the pleas as pleaded, are THE questions for determination here.

*Stead* v. *Crouse*, *supra*.

## II.

## CHARACTER OF THE GRANT.

This was a present grant. Its language is "*that there* "*be, and hereby is, granted to the State of Oregon,*" and for the purpose expressed, "alternate sections of public "land, designated by odd numbers, for three sections in "width on each side of said road" (13 Stats. 355).

The amendatory act of December 26, 1866 (14 Stats. 374), enlarging the grant to six sections in width to provide indemnity for losses within the original grant, uses the same words of present tense.

Many decisions of this Court thus expound the language here used.

In *Leavenworth, &c., R. R. Co.* v. *U. S.* (92 U. S. 733, 741) the Court said:

"It creates an immediate interest, and does not indicate "a purpose to give in future. '*There be and is hereby* "'*granted*' are words of absolute donation, and import a "grant *in præsenti*. This Court has held that they can "have no other meaning; and the land department, on "this interpretation of them, has uniformly administered "every previous similar grant. (*Railroad Co.* v. *Smith*, 9 "Wall. 95; *Schulenberg* v. *Harriman*, 21 *id.* 60; 1 Lester "513; 8 Op. 257; 11 *id.* 47.) They vest a present title in "the State of Kansas, though a survey of the lands and a "location of the road are necessary to give precision to "it, and attach it to any particular tract. The grant then "becomes certain, and by relation has the same effect "upon the selected parcels as if it had specifically de-"scribed them."

In *St. Paul & Pacific* v. *Northern Pacific* (139 U. S. 1, 5), this Court (Mr. Justice Field rendering the opinion) said:

" The language of the statute is '*that there be, and* " *hereby is*, granted' to the company every alternate sec- " tion of the lands designated, which implies that the " *property itself is passed*, not any special or limited interest " in it. The words also import a transfer of a *present title*, " not a promise to transfer one in the future.

" The route not being at the time determined, the " grant was in the nature of a float, and the title did not " attach to any specific sections until they were capable " of identification; but when once identified the title at- " tached to them as of the date of the grant, except as to " such sections as were specifically reserved. It is in " this sense that the grant is termed one *in præsenti*; " that is to say, it is of that character as to all lands " within the terms of the grant, and not reserved from it " at the time of the definite location of the route.

" This is the construction given to similar grants by " this Court, where the question has been often con- " sidered; indeed, it is so well setted as to be no longer " open to discussion. (*Schulenberg* v. *Harriman*, 21 Wall. " 44, 60; *Leavenworth, Lawrence, etc., R. R. Co.* v. *United* " *States*, 92 U. S. 733; *Mo. Kans. & Texas Ry. Co.* v. " *Kansas Pacific Ry. Co.*, 97 U. S. 491; *Railroad Co.* " v. *Baldwin*, 103 U. S. 426). The terms of present " grant are in some cases qualified by other portions of " the granting act, as in the case of *Rice* v. *Railroad Co.* " (1 Black, 358); but unless qualified they are to receive " the interpretation mentioned."

At the present term, in *United States* v. *Southern Pacific R.R. Co. et al.*, this rule is reaffirmed, the Court aptly observing that—

" If anything in the land laws of the United States can " be considered as thoroughly settled by repeated decis- " ions, it is this."

MANNER OF DISPOSAL BY THE STATE.

This present title conveyed to the State became inde-

feasible and could be sold as such in the manner prescribed by section 4 of the grant, viz:

"SEC. 4. *And be it further enacted*, That the lands "hereby granted to said State shall be disposed of only "in the following manner, that is to say: *that a quantity "of land not exceeding thirty sections for said road may "be sold; and when the Governor of said State shall cer- "tify to the Secretary of the Interior that any ten contin- "uous miles of said road are completed, then another quan- "tity of land hereby granted, not to exceed thirty sections, "may be sold, and so from time to time until said road is "completed;* and if said road is not completed within five "years, no further sales shall be made, and the land re- "maining unsold shall revert to the United States."

As to the first thirty sections, it is plain that the State took by the grant an immediate indefeasible title. Language precisely similar has been so construed by this Court in *Railroad Co.* v. *Courtright* (21 Wall. 310). The reasoning and result of that decision needs no elaboration here. Such lands are beyond the possibility of forfeiture on any ground, and are identified by this record, being the list certified November 13, 1867 (Rec. 19–21), containing 19,153.73 acres, as "making the first 30 sections which the "said State is authorized by the 4th section of the act to "sell in advance of the building of any portion of the "road."

It is equally certain that the title to the remaining sections became released from all conditions, and subject to sale as in fee, when the prescribed evidence of construction was filed, viz: THE CERTIFICATE OF THE GOVERNOR OF THE STATE.

This contention is broadly made and is fully supported both by reason and authority. This leads to discussion of—

## II.

## THE LEGAL EFFECT OF THE GOVERNOR'S CERTIFICATE OF CONSTRUCTION.

It is certain—

(*A*) That the manner in which the fact of construction should be ascertained and recorded, and the power to convey and of the public to purchase an indefeasible title to these lands, based thereon, was open to the deliberate choice of Congress.

(*B*) That with unrestricted choice of means Congress made the Governor its accredited agent, and armed him with exclusive authority and power.

(*C*) The certificate of the Governor, when thus made and recorded, was declared to be the sole and exclusive record whereon and whereby the fact of construction should be evidenced, and the restraint upon sale of the lands should, *ipso facto*, be removed.

(*D*) Neither the Secretary of the Interior nor any other officer or tribunal was charged with any affirmative duty, or clothed with power to inquire into the fact thus certified. The law was self-executing and the restraint upon alienation of these lands was removed the instant the certificate was filed.

In *United States* v. *Arredondo* (6 Pet. 691, 729) this Court said:

"It is an universal principle that where power or jurisdiction is delegated to any officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power con-

" ferred. The only questions which can arise between " an individual claiming a right under the acts done and " the public, or any person denying its validity, are power " in the officer and fraud in the party. All other ques- " tions are settled by the decision made or the act done " by the tribunal or officer, whether executive (1 Cranch " 170, 171), legislative (4 Wheat. 423; 2 Pet. 412; 4 Pet. " 563), judicial (11 Mass. 227; 11 S. & R. 429, adopted " in 2 Pet. 167, 168), or special (20 J. R. 739, 740; 2 " Dow P. Cas. 521, &c.), unless an appeal is provided for, " or other revision, by some appellate or supervisory tri- " bunal, is prescribed by law.

And the Court cites with approval the decision in *Polk's Lessee* v. *Wendell* (9 Cranch 99, repeated in 5 Wheat. 303) that—

" It would be extremely unwarrantable for any court to " avoid a grant for any irregularities in the conduct of " those who are appointed by the Government to super- " vise the progressive course of a title from its commence- " ment to its confirmation in a patent."

This language is equally pertinent here, where the title was conveyed by the grant, and the certificate of the Government's chosen representative is given such conclusive and controlling effect.

By the act of August 3, 1846, the Commissioner of the General Land Office, the Secretary of the Treasury, and the Attorney-General, acting conjointly, were authorized to examine, approve, or reject suspended and defective land entries under such general, equitable rules and regulations as they should establish. Certain entries were confirmed by those officers thereunder, and patented accordingly. In a subsequent controversy over the land embraced therein this Court, in *Foley* v. *Harrison* (15 How. 433, 448), said of this action:

" As this decision was made by a special tribunal, with " full powers to examine and decide, and as there is no " provision for an appeal to any other jurisdiction, the " decision is final within the law."

In *Johnson* v. *Towsley* (13 Wall. 72, 83) the Court recognizes the existence and force of the general doctrine :

" That when the law has confided to a special tribunal " the authority to hear and determine certain matters " arising in the course of its duties, the decision of that " tribunal, within the scope of its authority, is conclusive " upon all others."

And it therein applies the doctrine to the findings of fact made by the officers of the Land Department, declaring same open to judicial review only when fraud, imposition, or legal mistake appears.

In *Smelting Company* v. *Kemp* (104 U. S., 636, 640) this Court, in speaking of the acts and powers of officers of the U. S. Land Department, said :

" Their judgment in such cases is, like that of other " special tribunals upon matters within their exclusive " jurisdiction, unassailable except by a direct proceeding " for its correction or annulment. The execution and " record of the patent are the final acts of the officers of " the Government for the transfer of its title, and as they " can be lawfully performed only after certain steps have " been taken, that instrument, duly signed, countersigned, " and sealed, not merely operates to pass the title, but it " is in the nature of an official declaration by that branch " of the Government to which the alienation of the " public lands, under the law, is intrusted that all the " requirements preliminary to its issue have been com- " plied with."

So, in the case at bar, the certificate of the Governor showing the *fact* of construction, when filed with the

Secretary of the Interior, completed the record, gave the right to sell, and the purchaser thereunder acquired an absolute fee. The doctrine thus announced has been often applied by this Court and always to the same effect:

*Shepley* v. *Cowan*, 91 U. S. 330, 340.
*Moore* v. *Robbins*, 96 U. S. 530, 535.
*Quinby* v. *Conlan*, 104 U. S. 420, 426.
*Steel* v. *Smelting Co.*, 106 U. S. 447, 450.
*Lee* v. *Johnson*, 116 U. S. 48, 51.

In *Mo., Kans. & Texas R.R. Co.* v. *Kan. Pac. Ry Co.* (97 U. S. 491, 497) this Court aptly observed:

"It is always to be borne in mind, in construing a Con-"gressional grant, that the act by which it is made is a "*law* as well as a conveyance, and that such effect must "be given to it as will carry out the intent of Congress."

The intention of Congress expressed in the grant here in question does not admit of doubt. That the power to sell should arise and be open to full exercise on the making and filing of the Governor's certificate of construction, is beyond challenge. Facts *dehors* that record; subsequent allegations or suspicion of fraud, are matters entirely foreign to the actual investiture under the law of the power of sale expressly conferred when and "only" when the Governor should thus certify the fact of construction.

That such was the intention of Congress and the legal result of the language used in making the grant is conceded by the very existence of this suit. Failure to construct the road gave power of legislative forfeiture.

*Schulenberg* v. *Harriman*, 21 Wall. 44.

But the United States, by the act of Congress and by this suit thereunder, concedes the complete investiture of

title under the State, and its bill charging all purchasers with knowledge of the fraud alleged and praying decree forfeiting the grant—cancelling the Governor's certificates of construction, the certified lists and patents issued by the Land Department thereon, and the deeds to and from the original purchasers under the grant—is a full admission of the point we are now discussing, viz., that the Governor's certificate of construction removed the only bar imposed against the right and power to sell the land granted.

That Congress acted advisedly in prescribing the mode by which the fact of construction should be evidenced and placed of record is manifest from the further consideration that it chose *this* mode from among several theretofore adopted by it in making grants for railroad and other internal improvements.

Thus in the Pacific Railroad grants of 1862 (12 Stats. 489, sec. 4), and to the Northern Pacific Co., July 2, 1864 (13 Stats. 365, sec. 4, passed on the *same* day as was this wagon-road grant), Commissioners were authorized to examine and report on each section of constructed road, and only on their accepted report were patents to issue for the granted lands.

By the act of March 3, 1863 (12 Stats. 772, sec. 44), granting lands to the State of Kansas to aid railroad construction, the Governor's certificate of construction became operative only when and as "the said Secretary [of the "Interior] shall be satisfied that the State has complied "in good faith with this requirement, the said State may "cause to be sold" the lands thus earned, etc.

So by the act of May 5, 1864 (13 Stats. 66, sec. 7), granting lands to the State of Wisconsin for railroad purposes, the proof of construction required was the sworn statement of the President of the Company "certified by the "Governor of the State of Wisconsin" and "taken before "a judge of a court of record of the United States."

It is manifest, therefore, that the mode adopted by Congress in each case was the exclusive mode to be *followed* in each case, and when the prescribed certificate was made and filed the *power* of disposal, in accordance with the terms of the grant, immediately attached.

The case is analogous on principle with the swamp-land grant (9 Stats. 519), which imposed upon the Secretary of the Interior the power and duty of ascertaining and patenting the lands granted. In *Wright* v. *Roseberry* (121 U. S. 488, 509) this Court, concluding a review of the decisions thereunder, reaffirmed the ruling:

"That the action of the Secretary in identifying them " is conclusive against collateral attack as the judgment " of a special tribunal to which the determination of the " matter is intrusted."

When, then, this certificate was made and filed the public had the right to deal with this land as subject to sale, by unconditional title, and to purchase in absolute protection upon the faith of that record. The validity of the certificate, as the genuine signature of the officer and the true seal of the State attached thereto by his authority, is not challenged in any form. It was an official act and a solemn record, a muniment of title having all the force and dignity of a formal patent or conveyance because it attested in conclusive form the performance of the condition imposed and the consequent *right* of sale and purchase of the absolute, fee-simple title.

More effect it could not have, because it satisfied the sole condition and removed the only restraint upon conveyance; less it could not have within the law. Therefore the prayer of the bill for decree declaring forfeiture of the grant cannot be entertained. The reserved right of forfeiture ceased when the Governor's certificate of construc-

tion was filed. Both could not be in legal existence at the same time. The certificate is not alleged to be a forgery. Its execution is admitted. When filed it became the conclusive statutory record of the *fact*, on which alone the power of sale became absolute and the provision for reverter on failure to construct the road within the period limited therefor became inoperative.

This conclusion becomes a complete demonstration when tested by the fact that in the absence of the Governor's certificate of construction the United States could by direct legislative act forfeit and resume the grant, if the assumption of the bill be accepted, that the road was not built within the time limited therefor. But with such certificates in existence the United States is compelled to resort to the courts, and by a direct proceeding attack those certificates as fraudulent and ask their cancellation *in order to recover the title which has passed by the sale of the lands on the basis of such certificate and by the direct authority of the granting acts.*

The right of the United States to recover the title so made and passed is not denied UNLESS the certificates were not issued by fraudulent procurement as alleged, or UNLESS the defence of *bona fide* purchase for value here interposed is sustained by the evidence presented in its support.

## III.

The defendants plead generally denying complicity in the frauds alleged, and specially plead in bar that they had no knowledge of the asserted fraudulent procurement of the Governor's certificates, but had purchased *bona fide*.

To aid that special plea, testimony of certain officers of the Road Co. was taken as follows:

*Wm. S. Ladd*, of Portland, Oregon, testifies: Occupation, banker; was a stockholder and director of the Oregon Central Military Road Co., and its President when it sold its lands to the California purchasers in 1874.

"Q. At the time the sale of this land was made and the "deeds thereof delivered, or prior thereto, had the said "Oregon Central Military Road Company, or any of its "officers, stockholders, agents, or persons in its employ, "or acting in its interest, any knowledge, notice, or infor- "mation, or ground to suspect or believe, that any fraud "had been practised, or any misrepresentations made by "any persons whomsoever to induce the Governor of Ore- "gon to falsely issue the certificates mentioned in the bill "of complaint, certifying that the Oregon Military Road "(Company), mentioned in said bill of complaint, had been "duly and seasonably constructed, or to falsely induce "the Secretary of the Interior or Commissioner of the "General Land Office to list said land to the said com- "pany as having been duly earned by the construction of "said road, or to induce the President of the United "States to falsely issue patents for these lands so earned?

"Counsel for complainant objects, on the ground that "it is incompetent and immaterial.

"A. No; I never heard of any such thing."

Rec. 276, 277.

*Joseph N. Dolph*—occupation, Senator of the United States; by profession a lawyer—knew of the Oregon Central Military Road Co.

"3 Q. Were you at any time an officer of that com-
" pany, or if not an officer, did you ever have any business
" relations of any kind with it?

"A. I was for a time, and I think during the last years
" of its active existence, the treasurer of the company. I
" acted as attorney for the company for several years
" before it sold its land grant. I have an impression that
" during the whole or a portion of the time I was con-
" nected with the company I was a director, but it is only
" an impression. My recollection does not serve me on
" this point—probably because I have been connected
" with so many companies since. I would not be positive
" whether I acted as director of the company or not.

"4 Q. Were you its treasurer at the time it made sale
" of its lands?

"A. I think I was.

* * * * * * *

"8 Q. At the time of the sale of this land did you as
" one of the officers of the company, or did the company
" itself or any of the officers, stockholders, or agents rep-
" resenting the company, to your knowledge, have any
" knowledge or notice, information or ground to suspect
" or believe that any fraud had been practised, or that
" any representations had been made by any person, to
" induce the Governors or either of them to make false
" certificates concerning the construction of the road?

"Objected to as incompetent and immaterial.

"A. I had no knowledge or information nor ground to
" suspect that any misrepresentation had been made by
" any person to induce the Governor of Oregon to falsely
" issue the certificates mentioned. I had no reason to sus-
" pect, and no knowledge or belief, that the certificates had
" been falsely issued or were false in any respect. And I
" had no knowledge or belief, or reason to know or believe,
" that any other officer or agent of the company had any
" reason to believe that there had been any fraud prac-
" tised or any misrepresentation made by any person to
" induce the Governor of Oregon to falsely issue the cer-
" tificates, or in regard to any matter connected with the
" company or its property.

"9 Q. Had you any knowledge or information of any "fraudulent representation having been made to the "Secretary of the Interior or Commissioner of the General Land Office to induce those officers, or either of "them, to make false lists of lands as having been earned "to this company, or to induce the President of the "United States to falsely issue patents for lands so "claimed to have been earned?

"Same objections by complainant.

"A. I had not.

* * * * * * *

On cross-examination reference was made to the opinion upon the company's title given by Mr. Dolph, and he was asked:

"14 Q. In that opinion or certificate, of course, you "assumed, as a matter of fact, that the road provided for "in the act of Congress had been, as a matter of fact, "constructed, did you not?

"A. Certainly. The opinion has been since printed in "Congressional documents, and undoubtedly you have a "copy of it. I was not employed to investigate the "question as to whether the road had been completed. "I know no reason why such a question should be raised. "I knew from reports of agents and employees of the "company, and from other information, that the road had "been constructed; and I knew also that the Governor's "certificate had been issued to that effect; and therefore "I assumed that such was the fact, that the road had "been completed and the grant earned.

"15 Q. You had not been over the road yourself, had "you, at that time?

"A. No; I never have been over the road. I, however, "had heard much about the road before I ever became interested in it. I remember, the day that Governor Gibbs "returned to his office in this city after he had personally "inspected the first fifty miles of the road, of having a "conversation with him in his office (which was just

" adjoining mine), in which he said that that portion of the " road was the best mountain road he had ever seen.

" Counsel for complainant moves to strike out all of the " last foregoing answer relative to what was said about this " matter by other parties to the witness."

Rec. 279 283.

B. J. Pengra testifies (Rec. 229) that he was a stockholder, one of the incorporators, general superintendent, and at one time president of this Wagon Road Co.; that he was instrumental in organizing the company and obtaining the grant of lands (Rec. 230).

He further testifies (234, 235):

" 32 Q. Had you, as a representative and land agent " of the company, any knowledge or information of any " character to the effect that there had been any fraud " whatever practised on the part of the company or its " agents or officers for the purpose of inducing the Gov- " ernor to make his certificate of the completion of this " road?

" Objected to as incompetent and immaterial.

" A. I had knowledge—it was not very perfect, I might " say—that there had been an attempt made to obtain a " certificate from Governor Woods prior to the comple- " tion and construction of the road; and my recollection " now is that I obtained that knowledge on some action of " the board of directors long prior to this sale, from the " questions coming up in relation to the disposal of some " amount of stock that the company had been compelled " to take back that was being transferred to other parties. " I made inquiry, I recollect, and met it as an unfortunate " proceeding of the board, and succeeded in having it " stopped; did not look to me to be a very honest and " honorable one. I think I raised the question in regard " to whether they proposed to let the road go in that " shape. It was not completed then except out to Goose " Lake Valley, as I recollect.

" 33 Q. We are not speaking of the completion of the " road, Mr. Pengra.

" A. Well, that is the explanation of my language in re-
" lation to the question of fraud, and I want it taken
" down. When I testify on a subject and make a state-
" ment, and I am asked what I know, it is necessary for
" me to explain it, so that you will understand what that
" was.

" 34 Q. I simply ask you whether you had any notice
" of any fraud having been obtained in getting the Gov-
" ernor's certificate, and that is your answer to it?

" A. There was an effort of that kind, as I understood
" it, but not accomplished.

" 35 Q. At the time of the sale to these people neither
" they nor any of the parties associated with them had to
" your knowledge any notice of any fraud or anything of
" that kind?

" Objected to as incompetent by complainant.

" A. I hope you understand that I have said there was
" no such thing as fraud perpetrated, that there was some
" movement that seemed to look in that direction, and
" therefore when these people purchased there was no
" fraud. The company in its action was not stained with
" fraud; but what was attempted was not accomplished,
" and the road had been completed afterwards; I made a
" point that it should be.

" 36 Q. I am not asking that question, Mr. Pengra, as
" to the completion of the road.

" A. Well, these people, so far as I know, had no
" knowledge of that fact, of any fraud.

" 37 Q. And you yourself had none?

" Objected to as leading.

" 38 Q. So far as the issuance of the certificate finally
" was concerned?

" A. No, sir; I had no knowledge of the completion of
" any fraud. All my knowledge was the reverse of that."

No evidence in rebuttal was offered on this head. The counsel for the Government had insisted before the Examiner (Rec. 111) that the United States, under joinder of issue, had the right to begin with their testimony.

Defendants' counsel objected on the ground that the only questions open to proof were those raised by the pleas and replications, and that the onus of proving the truth of the pleas was upon the defendant. Thereupon the Government's counsel offered one George Joseph (a witness nineteen years of age, and to prove the facts of construction and matters occurring before his birth), and the Examiner certified to the Court for its determination the inquiry as to the onus, scope, and order of proof. Thereon the Court ordered (Rec. 13) "that the defendants do first "proceed to take testimony in support of their pleas." At the conclusion of defendants' testimony, the Examiner certifies that "the counsel for complainant then stated that "in view of the ruling of the Court he had no further testi-"mony to offer and therefore rested his case" (Rec. 286). This being based on the Court's refusal to permit the United States to go into testimony as to the facts of construction and alleged wrongful procurement of the Governor's certificates because not in issue under the plea (Rec. 131).

V.

## THE DEFENCE OF BONA FIDE PURCHASE.

**This is fully sustained by defendant's evidence supporting the plea. Against it the United States did not offer any counter-proof. The argument thereunder involved (1) its sufficiency and (2) its truth.**

### SUFFICIENCY OF THE PLEA.

The plea (Rec. 82–86) avers the chain of title, purchase of the lands thereunder, the consideration and its actual payment, and denies notice or knowledge of the frauds now alleged. The United States does not challenge its sufficiency in form and by joining issue thereon all possible objections of form are waived.

In *Colorado Iron Co.* v. *U. S.* (123 U. S. 307 313) this Court said:

"It is fully established by the evidence that there were "in fact no actual settlements and improvements on any "of the lands as falsely set out in the affidavits in support "of the pre-emption claims and in the certificates issued "thereon. This undoubtedly constituted a fraud upon the "United States sufficient in equity as against the parties "perpetrating it, or those claiming under them with notice "of it, to justify the cancellation of the patents issued to "them. But it is not such a fraud as prevents the pass-"ing of the legal title by the patents. It follows that to "a bill in equity to cancel the patents upon these grounds "alone THE DEFENCE OF A BONA FIDE PURCHASER FOR VALUE "WITHOUT NOTICE IS PERFECT.

"In reference to such a case, it was said by this Court "in *United States* v. *Minor* (114 U. S. 233, 243): 'Where "'the patent is the result of nothing but fraud and per-

"'jury, it is enough to hold that it conveys the legal title,
"'and it would be going quite too far to say that it can-
"'not be assailed by a proceeding in equity and set aside
"'as void, if the fraud is proved, AND THERE ARE NO INNO-
"'CENT HOLDERS FOR VALUE.' (*Meader* v. *Norton*, 11 Wall.
" 442, 458.) It is, indeed, an elementary doctrine of equity
" that where a grantor has been induced by fraud to part
" with the legal title to his property, he cannot reclaim it
" from subsequent innocent purchasers for value."

This doctrine applies in the present case not alone to the lands patented and certified but to the entire grant, and is expressly recognized by the act under which the suit is brought.

TITLE WENT BY THE GRANT, AND ON IDENTIFICATION OF THE LANDS BY DEFINITE LOCATION OF THE ROUTE OF THE ROAD, RELATED TO ITS DATE. FULL POWER OF ALIENATION AROSE ON MAKING AND FILING OF THE GOVERNOR'S CERTIFICATE OF CONSTRUCTION. THE GRANTING ACT CONTEMPLATED NO FURTHER CONVEYANCE, AND ON COMPLIANCE WITH THIS PRESCRIBED CONDITION TITLE WAS FULLY VESTED AND BECAME CAPABLE OF SALE TO AND PURCHASE BY THIRD PERSONS.

A grant may be made by a law as well as by a patent pursuant to law.

*Ryan et al.* v. *Carter*, 93 U. S. 78, 82.
*Tameling* v. *U. S. Freehold Co.*, *id.* 644, 663.

Such title will support ejectment, even under a railroad grant where issue of patent was expressly authorized and before issue thereof.

*Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241.

The subsequent issue of patent adds nothing to the force of the grant, giving only a further assurance of title and evidencing in that convenient form compliance with its conditions.

*Ibid.*

*Wisconsin R.R. Co.* v. *Price County*, 133 U. S. 496, 510.

*St. Paul & Pacific R.R.* v. *Nor. Pac. R.R.*, 139 U. S. 1, 6.

The act of 1874 authorizing patents under these wagon-road grants did not change the legal status, for as said in the case last cited—

"There are many instances in the legislation of Con-
"gress where patents are authorized to be issued to
"parties in further assurance of their title, notwithstand-
"ing a previous legislative grant to them or a legislative
"confirmation of a previously existing claim. THE PRE-
"VIOUS GRANT OR CONFIRMATION IS IN NO RESPECT IMPAIRED
"THEREBY, OR ITS CONSTRUCTION AFFECTED. See on this
"point *Langdeau* v. *Hanes* (21 Wall. 521); *Wright* v.
"*Roseberry* (121 U. S. 488, 497.)"

Precisely as the grant of sections 16 and 36 in every township to the State for the support of schools is held to be *in præsenti*, vesting legal title on identification by survey, and for which no further evidence or assurance of title is given or prescribed.

*Cooper* v. *Roberts*, 18 How. 173.

*Beecher* v. *Wetherby*, 95 U. S. 517.

TRUTH OF THE PLEA.

**The plea being shown to be sufficient to bar the relief prayed, its truth appears from the uncontradicted evidence presented in its support.**

"The essential elements which constitute a *bona fide*
"purchaser are therefore three—a valuable consideration,
"the absence of notice, and presence of good faith."

*Pomeroy's Equity Jurisprudence*, Vol. II, § 745.

The original purchasers of this grant as named in the deeds (Rec. 62, 67) number fourteen. They were all citizens of California, residing in San Francisco, Oakland, Marysville, Sacramento, Colusa, and other points. Eight of them have since deceased (Test. Mr. Pond, Rec. 267). Those still living all testify in this case, with several others who later became interested in the purchase with them but whose names do not appear in the deeds.

They are:

Mr. E. B. Pond, president of the defendant Land Company, farmer and banker.

Mr. Edgar Mills, banker, of Sacramento.

Mr. B. F. Baker, miner, of Healdsburg.

Mr. M. P. Jones, merchant, of San Francisco.

Mr. C. H. Holbrook, lumberman, of San Francisco.

Mr. Robert Hamilton, merchant, of San Francisco.

Mr. L. L. Baker, merchant, of San Francisco.

Mr. James Carolan, merchant, of San Francisco.

Mr. John Boggs, farmer, of Colusa.

Mr. N. D. Rideout, banker, of Marysville.

Mr. William C. Belcher, lawyer, of Marysville.

The testimony of these gentlemen is full, direct, and positive, extending from p. 145 to p. 275 of this record. It is impossible here to do more than state its results. As to each and all it establishes the "essential elements" *supra*, which demonstrate good faith and bring them fully within the protection invoked. It appears that in the spring of 1874 the agent or representative of the Wagon Road Co. (one Walker) brought to the attention of these California purchasers, or some of them, the fact that this grant was for sale—submitting an abstract of title, which now appears in the record (pp. 287, 312), containing the grant from Congress to the State and from the State to the Wagon Road Co.; the certificates of the Gov-

ernor showing construction of the entire road; the filing thereof with the United States Land Department; maps showing the road and limits of the grant; the certification of some 361,000 acres by the Secretary of the Interior to the State as enuring under the grant, and the opinion of Messrs. Mitchell & Dolph declaring the title perfect and subject to lawful sale. All of these were examined by Mr. Belcher (one of the purchasers and a lawyer of high standing and ability) and by the other parties or their attorneys. The grant was offered entire for $200,000, or one-half thereof for one-half that sum. The parties acted individually; purchased in individual interests, and on the advice, belief, and understanding that the title was perfect, paying $100,000 for one moiety of the grant and taking an option for the purchase of the remainder, which, in October following, was followed by their purchase of the remaining moiety and payment of the $100,000 additional therefor.

That they held the property in individual ownership for several years, when, to avoid the difficulties necessarily arising in its care and management under such conditions, the California and Oregon Land Company was organized by them, to whom the property was conveyed in exchange for the stock thereof, apportioned according to their respective interests.

That these purchasers and the company have expended in the care of the property some $140,000, including $50,000 for State taxes on the lands, making, with the purchase price paid, a total expenditure of $340,000, and have received in sales and rentals not to exceed $23,000.

All of these purchasers swear in direct and positive terms that they purchased in good faith, believing they were acquiring an undoubted legal title, and without the slightest suggestion, notice, or knowledge that there was

any fraud connected with the grant, and averring that had they known of such a thing they would not have so purchased.

The details of their preliminary examination and conduct in the matter are set forth by each witness, the payment of each man's share of the purchase-money is directly affirmed in detail, and its receipt by the Wagon Road Company admitted by the testimony of its President, Mr. W. S. Ladd (Rec. 276–279), and Mr. Dolph, then Treasurer of the Wagon Road Co. (Rec. 280), who states:

"The whole purchase price was paid and distributed
" among the stockholders, and the affairs of the company
" wound up within a very brief period after the sale was
" made."

In the cross-examination of President Pond it was developed that while the entire $200,000 was paid by these purchasers, he had found, years later, from an entry in the books of the Road Company, that it had received but $50,000 of the first purchase payment of $100,000, and but $75,000 of the second $100,000 payment. He disclaimed all knowledge of where and how this difference had been disposed of, and testifies positively that the purchasers paid no brokerage. He states (Rec. 271):

"I know we furnished $200,000 and sent it here to pay
" for these lands; we got the deed, and the consideration
" in the deed was $200,000, and we supposed it was all
" paid."

And while the testimony of Mr. Ladd, the Road Co.'s President, and Mr. Dolph, its Treasurer, shows that the company received $125,000 from the sale of the grant, it was not developed where the additional $75,000 had gone. The fact, however, is not material. The entire

$200,000 was paid, and while the strong presumption is that some one received brokerage it is certainly fully proven that these purchasers acted in good faith and paid their respective shares in full.

Attempt was also made by cross-examination to show that Mr. G. W. Colby, who came to Oregon to consummate the purchase, was the general agent or representative of his associate purchasers, and hence any knowledge of fraud now alleged he *might* have derived was binding upon them. Mr. Colby died ten years ago (Rec. 267), but it is sufficient to say that the record does not even suggest that Mr. Colby came into the knowledge of any such facts or even any ground for suspicion, except the statement of Mr. Pengra that just before the second purchase of October, 1874, Colby made a general inspection of the grant with him. But each of the purchasers positively states that Mr. Colby went to Oregon authorized by them only to investigate the records to ascertain that no liens or incumbrances existed against the property which would operate to their injury in making the purchase. That no question was suggested as to the construction of the road, as they implicitly relied upon the Governor's certificate of that fact. They further swear that Mr. Colby never in any manner communicated to them any suspicion, knowledge, or statement involving any question of the non-construction of the road or any possible fraud in the transaction. He was not their agent in any sense, but a co-purchaser with them, and Mr. Pengra testifies that there was no fraud and Mr. Colby had no knowledge of any, for none existed (Rec. 235).

Mr. Pengra further testified (Rec. 233) that he was present at all the conferences over the matter of the sale; that questions were asked in relation to the title, the method and manner of securing title—

"And the record showed and I think the Secretary of "the company, who is now Captain Drake, read the re- "ports of the different seasons that the work was under "progress, showing what the cost of construction had "been, and the final report of completion of construction "under Superintendent Odell.

"31. Q. What I wish to call your attention to, Mr. "Pengra, is this: I want to know whether any of these "people had any knowledge or notice that there was any "fraud of any sort practised.

"A. That inquiry was answered by the company to the "effect that the road was completed from every source "and information that they were in possession of. They "had no knowledge that I know anything about. I was "not, perhaps, conversant with all the knowledge they "might have, but so far as my knowledge goes they had "no knowledge of anything of that kind in any way, "shape, or form of fraud."

Mr. Dolph testifies (Rec. 282) that the amount received by the company ($125,000)

"Just about covered the original outlay of the company "upon the road, without interest. I know the stock- "holders, of which I was one, made nothing out of the in- "vestment, and had it not been for the small compensa- "tion which I received as Attorney and Treasurer of the "company, I should have lost by my investment in it."

This is *all* this record discloses as to the facts of construction imparted to Mr. Colby. Certainly nothing therein could be suggested to put him or any of the purchasers upon further inquiry, but only the contrary.

After being thus informed, how can it be justly contended that Mr. Colby, or these purchasers, were bound to examine and ascertain that the road was constructed in fact? The certificates of the Governor and the company's reports of work upon the road, and the statements made

as recited, *supra*, were sufficient to satisfy any man of ordinary prudence, and no duty to go further in that direction was imposed. It must be remembered that these purchasers were not buying the *road;* on the contrary, the deeds from the company expressly except the right of way one hundred feet in width wherever the "TRAVELLED "ROAD" of the Wagon Road Company crossed the odd sections granted and thus sold. Not a fact is developed, by counter-proof or otherwise, tending to show that any one doubted the fact of construction. The Legislature of Oregon did not *initiate* a movement against these grants until 1885—over ten years after this purchase was made. There was not on public record, nor, so far as here disclosed by pleading or proof, a single circumstance to put any one on inquiry; and certainly these purchasers would not have invested $200,000 with any such knowledge or suspicion of possible wrong.

All the record, all the surrounding circumstances and proof, as here made, disclose the contrary. Shall the evidence presented by the granting act and accepted by the Government, and on which over 400,000 acres of this grant were certified and patented, be held insufficient to justify these purchasers in relying upon the *same* evidence, the Government's recognition thereof, and certification of 360,000 acres of this land *prior* to their purchase? In effect the United States pleads its own wrong. Between private litigants, and after such conduct, no court would punish him who thus relied upon the record made by his adversary. We submit the Government is equally bound, and is estopped in equity and good morals from making the contention here set up.

Nor can inadequacy of consideration paid be urged. The rule is well settled that—

"The amount of the purchase, if otherwise in good "faith, is not generally material."

*Pomeroy's Equity Jurisprudence*, Vol. II, § 747, and authorities there cited.

But this record discloses that full value was paid, viz., $200,000, which in eighteen years has returned but $23,000 against an expenditure of $140,000 in the care of the property, and of which $50,000 was for taxes alone. Certainly the investment has not been profitable. True, Mr. Pengra swears he objected to the sale because he thought the lands were worth more, but, when asked to give values, answered:

"Oh, that is a mere matter of my opinion at the time, "*and that opinion was based on prospective values*" (Rec. 243).

He further testifies (Rec. 237):

"We had completed the construction of the road, and "we could not agree as regards the system and method of "disposing of the lands, and they were determined to sell "the lands so as to recover the amount of funds they had "put into them; that was just about what they did by "that—wanted to get the money back."

### Form of the Deeds.

The United States, having failed to meet this testimony establishing *bona fide* purchase with counter-proof, denies the defendant's right to protection under its plea, on the ground that the deeds from the Wagon Road Co. to its agent, Pengra, and from the latter to these purchasers, are mere quitclaim conveyances, and under such form of conveyance these purchasers are not within the protection which equity affords.

Denying such to be the rule, and further denying the possible application thereof to this case in any view, it is insisted in the first instance that the deeds under which these purchasers acquired this title are *not* mere quitclaim conveyances.

Two deeds were made by the Wagon Road Co. to its agent, Pengra, and two by him in turn to these purchasers:

May 12, 1874, Wagon Road Co. to Pengra (Rec. 53–58),
May 15, 1874, Pengra to Colby *et al.* (Rec. 62–64),
Conveying an undivided one-half of the grant;

Oct. 12, 1874, Wagon Road Co. to Pengra (Rec. 58–61),
Oct. 15, 1874, Pengra to Colby *et al.* (Rec. 65–67),
Conveying the remaining one-half of the grant.

It appears from the testimony of Mr. Ladd, President of the Wagon Road Co. (Rec. 277, 279), that the purchase-money was paid to that company, and that Mr. Pengra was authorized by the company to find purchasers. Mr. Pengra testifies that the purchasers could not agree with the company as to terms, and the conveyance was made to him, "and immediately afterwards, certainly not more "than two or three days, there was an arrangement closed "between me and them." (Rec. 237.)

It is thus apparent that the deeds are to be read together and treated as parts of a single transaction in which the company, by its agent, its President, and other officers, took direct and active part.

The Wagon Road Co.'s deed of May 12, 1874, to Pengra (Rec. 53, 58) is for an expressed consideration of one dollar "and other considerations, it hereunto moving," and "does "hereby *alien, release, grant, bargain, sell, and convey*"—

1st. An undivided one-half interest of the grantor in the lands granted by the acts of Congress and of the

State, fully recited by date and title, and expressly made part of the deed, with the undivided one-half of the grantor's right, title, and interest "to said grant of land "under the several acts aforesaid, whether listed and ap- "proved or otherwise."

2d. An undivided one-half of all the grantor's "*future* "right, title, interest, claim, property, and demand" which it might further acquire under the recited grants.

3d. Reservation is made of prior sales not exceeding 7,000 acres, and 200 feet in width for right of way of the "travelled road of the party of the first part," with necessary grounds for toll-houses, depot grounds, switches, etc., for any future railroad constructed over said route.

4th. Provision is made for selection of the lands granted as surveys progressed, and to be made under the Wagon Road Co.'s supervision and at equal cost to grantor and grantee; the grantee's payment of one-half of all taxes and for the appraisement of the lands.

5th. Covenant for future execution of "any proper as- "signment, release, or quitclaim deed" (if called for prior to the grantor's dissolution) "necessary or proper to "carry out or effectuate the object of this conveyance, to "wit, the conveyance to the party of the second part of "the undivided one-half of the title and interest of the "party of the first part in and to the grant of lands made "by said several acts of Congress and of the Legislative "Assembly of the State of Oregon, or of which said party "of the second part, his heirs or assigns, shall be advised "by counsel learned in the law to be so necessary and "proper for the purposes aforesaid."

The deed of May 15, 1874 (Rec. 62), from Pengra to Colby *et al.*, recites a consideration of one hundred thousand dollars, gold coin; conveys "the equal undivided one- "half" of said grant described by express reference to said

acts, the words of transfer being "*alien, release, grant, bar-* "*gain, sell, and convey.*" The same reservations are recited as in the former deed, *supra*, the same conveyance of all future "right, title, interest, claim, property, and demand" under the grants is made, and subject to the "covenants "and conditions, reservations and exceptions" made in the Wagon Road Co.'s deed to Pengra.

The deed of October 12, 1874, by the Wagon Road Co. to Pengra, recites the consideration as $75,000; conveys in the same form of words as used in its prior deed all its present and future interest under the grant, with reservation of prior sales—right of way for the wagon road—and covenants for payment of taxes for the then fiscal year.

The deed of October 15, 1874, from Pengra to these purchasers recites the consideration of one hundred thousand dollars, gold coin; conveys the remaining one-half interest in the grant, present and future, with the same reservations as expressed in the Wagon Road Co.'s second deed to him.

The legal effect of these deeds is far more than that of a mere quitclaim instrument.

*A.* A conveyance by mere quitclaim carries only the title *then* held by the grantor, be it much, or little, or none, and does not carry nor affect an after-acquired estate. In the case at bar the deeds expressly convey *all* future right or estate and would operate by estoppel upon any subsequent patents or certifications issued by the United States under the grant, as was the actual fact in this case (Patents of 1883, 1884, Rec. 44, 53).

*B.* Mere quitclaim conveyance neither carries nor implies the covenant for further assurance. Here this covenant appears in express words.

*C.* The grants by Congress to the State and by the State to the Wagon Road Co. are recited as the *foundation* of

the title conveyed, and are expressly made part of the instrument of conveyance, demonstrating the transfer of full legal title from the paramount source.

*D.* The operative words of conveyance are "alien, re- "lease, *grant, bargain, sell, and convey.*"

By the statute of 6 Anne, ch. 35, § 30, and the decisions in many of the States these words imply covenants (1) of seisin, (2) against prior incumbrance, and (3) for further assurance.

*Washburn on Real Property*, 3d ed., vol. III, pp. 416–417, and other authorities cited.

Section 3 of the conveyance act of Oregon, 1854 (p. 516 of General Laws), provides that a deed of quitclaim and release of the form in common use shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale.

In *Taggart* v. *Risley* (4 Oregon, 235) the Court held that after-acquired title passes by a deed which clearly shows that the grantor intended to pass an absolute title, and not merely the title which he had at time of conveyance, and this though the deed contained no express covenant of warranty.

The Court puts the decision upon the special covenant and holds that "The question is one of intention (3 Met. "121, 6 Cush. 33) and the whole instrument must be taken "together and effect must be given to its meaning and as "derived from each and every part of it. If the terms of "a deed plainly show that it was meant to pass an abso- "lute estate to the land itself and not merely the estate "which the grantee had at the time it will bind and pass "every estate or interest which may vest in him subse- "quently to its execution, though it contained no war- "ranty."

The Court cites *Van Rensselaer* v. *Kearney* (11 How. 325); *Fitzhugh's Heirs* v. *Tyler* (9 *B. Mon.* 559).

To sustain the contention made by the United States, that purchasers by quitclaim deed are not within the protection of equity, several decisions of this Court will doubtless be cited as giving assumed color of authority therefor: but examination of these cases will show that the question was not involved and the expression of view indulged was pure *dicta*.

Thus in *Oliver* v. *Piatt* (3 How. 333) the grantee under quitclaim conveyance was expressly found to have purchased with actual knowledge of the prior equity of his adversary (pp. 409, 410), and such actual knowledge (effective against him notwithstanding the *form* of his conveyance) was the express ground on which his claim to protection was denied.

In *May* v. *LeClaire* (11 Wall. 217) the express finding is that Cook, the quitclaim purchaser, "had full notice of "the frauds of Powers and of the infirmities of Dessaint's "title" (p. 232), and the declaration *obiter* of the rule that a purchaser by quitclaim deed is not within the protection of equity is made with sole citation of *Oliver* v. *Piatt*, *supra*.

In *Dickerson* v. *Colegrove* (100 U. S. 578) the action was ejectment under quitclaim deed. Defendant plead title by warranty, many years' open possession, and estoppel by acts *in pais* committed by plaintiff's grantor. The defence of estoppel was sustained, and on this ground the judgment was affirmed, the Court remarking in conclusion (p. 584) that as plaintiff took by quitclaim deed and when defendants were in actual possession, he was subject to all legal and equitable rights of defendants and their grantor, citing on the first head the two cases *supra*.

In *Baker* v. *Humphrey* (101 U. S. 494) the quitclaim con-

veyance relied upon was found to have been made to a nominal purchaser in the interest of an attorney, who was found not only charged with actual notice, but concluded by professional relation to the parties.

Hence, for the purposes of this case, the question may justly be said to be *res nova* in this Court.

Assuming, *pro argumento*, the deeds in question, because lacking in covenants of general warranty, to be quitclaim instruments, consideration of the state of the law and judicial decision on this head is important.

Primarily it may be justly observed that in all the cases the controversy is between private litigants; that the title claimed is one proceeding from private sources, and all the elements of adverse possession, statutes of limitation, outstanding title by descent, and the infinite variety of circumstances operating to create and preserve private rights are present in a thousand forms, whilst here the title purchased and conveyed proceeded from the paramount and undoubted source (the United States) to the State and thence to the Wagon Road Co. by public legislative acts, against which individual claims or equities had no possible existence. This is a distinction at once apparent and of controlling force.

Whilst some authorities maintain the rule that the purchaser by quitclaim is not protected, many others (including the more recent) affirm the contrary, modified in some instances by applying the just test of actual *intention* and the acts of the purchaser as indicating the measure of his good faith.

It is impossible here to review all the cases. General doctrines illustrated by citations can only be presented.

In an able review of this question published in the *Central Law Journal* of February 26, 1892 (Vol. 34, No. 9), the grounds of argument, *pro* and *con*, are stated with

great clearness and full citation of the cases. We invoke the Court's examination thereof. Whilst too long to be reproduced here, the writer follows the statement of the variant rule, with the following just observations, fortified by citation of many authorities:

"*The True Criterion that of Intention and Actual Good* "*Faith.*—The construction that a quitclaim charges the "purchaser with bad faith absolutely and as a presump- "tion of law not rebuttable is an extreme one, and estab- "lishes an arbitrary rule for which there is no just occa- "sion. The intention of the parties and the actual good "faith of the purchaser are the controlling elements in "the matter, and there is no substantial reason why the "courts should not here, as in other cases of contract, "give effect to this intention, and place a purchaser by "quitclaim within the protection of the recording acts "where the facts may so warrant. The prior purchaser, "or party at interest, is in default in not having put on "record the evidence of his right, and where the subse- "quent purchase is in fact made in good faith and for fair "value, he can have no just concern in the mere form of "the instrument evidencing it; nor should the courts as- "sume, because of this matter of form, to exclude from "the broad policy and equitable protection of the registry "acts one who has in good faith relied upon the records "as the law invites him to do. The question of good faith "in fact necessarily arises in all cases of subsequent pur- "chase, whatever be the form of conveyance, as this is "requisite to defeat the prior right. That the subsequent "purchaser has taken a quitclaim may properly be looked "to as a significant circumstance in determining this mat- "ter of good faith, but where it is satisfactorily shown "that he purchased *bona fide* and for value, he is entitled "to protection. This doctrine is distinctly established in "at least one State, and in many others the current of ju- "dicial opinion is strongly in this direction. In those "States whose courts accord protection to the quitclaim "purchaser, resting it on the terms of their statues, the

" decision is in fact largely based upon, and necessarily " inclusive of, this principle; for when a quitclaim is placed " on the same footing with other deeds, the question of " good faith in fact still remains a controlling element in " the case."

As supporting this view, the following citations are given by the foot-notes:

" Chapman *v.* Sims (53 Miss. 163), reviewing and ana- " lyzing decisions of that State, and of the U. S. Supreme " Court supposed to hold the contrary. See also Cutler " *v.* James (64 Wis. 173, 24 N. W. Rep. 824, 54 Am. Rep. " 603) and the other cases cited in note 13 *post*, in which, " though the decision in favor of the quitclaim purchaser " is rested in part on a construction of the statutes, the " view that such deed does not impute bad faith or charge " notice is fully maintained.

" Brown *v.* Banner Oil Co. (97 Ill. 214, 37 Am. Rep. " 105); Graff *v.* Middleton (43 Cal. 340); Allison *v.* " Thomas (72 Cal. 562, 1 Am. St. Rep. 89); Munson *v.* " Ensor (94 Mo. 566, 7 S. W. Rep. 108); Fox *v.* Hall (74 " Mo. 315, 41 Am. Rep. 316); Sharp *v.* Cheatham (88 " Mo. 510); McConnell *v.* Reed (4 Scam. 117, 38 Am. " Dec. 124). 'A purchaser for value by quitclaim deed " 'is as much within the protection of the registry act as " 'one who becomes a purchaser by warranty deed. This " 'is the clear effect of the statutes, and the courts have " 'no power to repeal them.' (Munson *v.* Ensor, *supra.*)

" The intention of the parties is the polar star by which " courts are always to be guided in the construction of " contracts by deed or otherwise. (Butterfield *v.* Smith, " 11 Ill. 485; Jackson *v.* Fish, 10 Johns, 456; Pray *v.* " Pierce, 7 Mass. 381; Hall *v.* Ashby, 9 Ohio, 96; 34 " Am. Dec. 424; Lynch *v.* Livingston, 6 N. Y. 422.)

In the copious notes found appended to the decision in *Basset* v. *Nosworthy*, (*White and Tudor, Leading Cases in Equity*, vol. II, part I, pp. 72, 73) the same view is expressed thus:

"There is more difficulty in assenting to a dictum in "Oliver *v.* Piatt, that taking a deed with a covenant of "special warranty is sufficient to show a doubt of the "warrantor's title. Such an inference would appear "wholly inadmissible, and would be received with no lit-"tle surprise in Pennsylvania, where covenants of gen-"eral warranty are so unusual, that in *Cresson* v. *Miller* "(2 Watts, 272) the introduction of such a clause into a "deed was made the ground of a presumption against "the good faith of the purchaser. The true doctrine "seems to be that where it is apparent from the whole "transaction that the purchaser had no doubt of the "goodness of the title, and gave a full price for what he "believed to be the fee, it is immaterial whether the grant "is by way of release or of bargain and sale, and whether "it does or does not contain a warranty. (*Fluga* v. *Mann*, "2 Sumner, 486, 562.) This is the more obvious, because "a lease and release was, and perhaps still is, the mode "of conveyance ordinarily used in England." (2 Bl. "Comm. 339.)

The application of the strict rule *contra* to the present case would operate with far more severity than could be assumed as against private individuals. The *fee* of these lands was in the United States; there was no possibility of interest existing against this paramount source; it was conveyed by a public grant, in apt and certain words, and had become fully *vested* in the Wagon Road Co. through the grant by the State and by its public act; the sole condition subsequent on which sale of the land was authorized had been performed, viz., making and filing of the Governor's certificate of construction. The United States had acted thereon; had certified the *fact* of construction, and by its authorized department had certified fully one-half of the grant on the faith thereof. All this these purchasers, and the world, knew. It was matter of public record—complete and without a flaw. On this accumulated evidence they purchased for a large consideration, and for

eighteen years have held the title, paying not only $200,000 as the purchase price, but since expending $140,000 in the care of the property, wherefrom the State of Oregon has now received $50,000 in taxes. The purchasers *all* testify (who are now living) to their strict integrity in the transaction, and their testimony stands unchallenged, and is as perfect in establishing their good faith as human evidence can furnish. There was nothing to put them upon notice, but everything to lull them into perfect security. On such a record we submit the rule of equity cannot be held otherwise than as entitling them to full protection.

The dissenting opinion of Hanford, J., in the Circuit Court of Appeals, whilst in strongest terms sustaining as the true rule, *supra*, the doctrine of intention and acts of the parties, as the test of *bona fides*, denies its application here on the sole ground that the deeds from the Wagon Road Co. to Pengra conveyed only its "right, title, "and interest" in the lands and grant, and not the land itself, holding hence that these purchasers took through such form of conveyance at their peril. But this Court, in *Brown* v. *Jackson* (3 Wheat. 449, 453), held:

"A conveyance of the right, title, and interest in land "is certainly sufficient to pass the land itself, if *the party* "*conveying has an estate therein at the time of conveyance*; "but it passes no estate which was not then possessed by "the party."

That the Wagon Road Co. had such an estate in the land is beyond question. And Mr. Washburn affirms the same rule (Real Property, 3d ed., Vol. 3, p. 314), thus:

"A deed of all the grantor's right and title to land con-"veys the land itself."

The Wagon Road Co. had perfect record title; the certification by the U. S. Land Department of 361,000 acres

went by its deeds to these purchasers; much of the remainder of the grant was unsurveyed. As surveys progressed, selection, listing, and patenting was required, involving expense and responsibility. The company had completed the object of its creation, viz., construction of the road; it desired to sell its grant and wind up its affairs. It actually did so and went out of existence soon after the sale (Testimony of Mr. Dolph, Rec. 280), distributing its assets among its stockholders; its title was of record, direct from the paramount source.

A corporation under such circumstances would obviously prefer to convey only its title, present and future (then unquestioned from any source), and did so convey, covenanting to give any further assurance if called for before its dissolution. The purchasers were fully justified by the record and all the circumstances in accepting the form of conveyance given, and the developments of long subsequent years cannot justly be invoked to throw an assumed taint of suspicion upon a transaction entered upon and consummated in perfect good faith by men whose integrity and standing in California are unsurpassed. Nor can their title be justly held subject to defeat on the technical ground here set up. The United States should not be permitted to thus punish its citizens, who have invested such enormous sums upon the faith of a record, which its legislation prescribed and which its own officers affirmed by authorized official acts, and on the faith of which these citizens have acted.

A few remaining points require brief notice, because assigned for error here.

A.

The bill averred (Par. III, Rec. 5) that by the general incorporation law of Oregon of 1862 any road (other than

a railway) constructed by any corporation incorporated thereunder should be built in a special manner therein prescribed, and (Par. IV, Rec. 6) that this Wagon Road Company was incorporated thereunder, the implication being that its road, in matter of construction, was controlled by this general law.

But the grant from Congress (act of 1862) provided in section 3 that the road in aid of which the grant was made "shall be constructed with such width, gradation, "and bridges as to permit of its general use as a wagon "road, and in such *other* special manner as the State of "Oregon *may* prescribe."

The State act conferring the grant upon the Wagon Road Company did so "upon the conditions and limita- "tions therein prescribed," and thus without any "other" or "special" requirement.

Upon exception to this portion of the bill and hearing thereon, such exception was sustained (Rec. 80).

The Court was clearly right. The special provision in the act of Congress was not in any manner affected or controlled by the general law of the State, and as the State in turn adopted the provisions of the Federal granting act, without prescribing any further conditions, it is manifest the prior general law of the State had no relation to the subject. Had Congress prescribed a manner of construction totally different from that provided by the general law of the State it is certain the latter would have no application nor control. Congress made no reference to such law, and the power conferred upon the State to *add* to the Congressional requirement as to mode of construction had clear meaning and application, as investing the State with power to thereafter *specially* prescribe as to *that* road any other and additional requirement, and which she did not do.

B.

The bill averred the failure to *maintain* the road after construction (Par. XIII, Rec. 11), and an exception thereto was sustained (Rec. 80).

There was no condition in the grant requiring the road to be maintained after construction, and as its presence therein would have required such perpetual labor and repairs as to make the undertaking equivalent to a requirement to constantly build a road (which by the forces of nature and across the mountains was peculiarly subject to constant destruction) it may well be doubted whether the grant would have been accepted by any one burdened with such a condition. The road was projected to afford a passage-way over the mountains into Eastern Oregon and pioneer the way for settlement of that region. But its future maintenance was dependent upon the local communities, and (as actually occurred), the drift of settlement caused other roads to be opened and to diverge therefrom, and consequent abandonment of this highway after it had served its original purpose. The nature of the improvement and its primary object was far different from that involved in the construction of a railroad, which when built must necessarily be maintained, because none but the corporation can operate or use it, and its construction and maintenance are in effect synonymous in intent (and many times in expression) in the granting acts. Such a condition here cannot be inferred, and is certainly not expressed.

We submit the decree below should be affirmed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
*Attys. for Appellee.*

148 U.S. 231

Office Supreme Court U. S.
FILED.
JAN 9 1893
JAMES H. McKENNEY,
CLERK.

# UNITED STATES SUPREME COURT.

## OCTOBER TERM, 1892.

No. 1073.

THE UNITED STATES,
*Appellant,*

*vs.*

THE CALIFORNIA AND OREGON LAND COMPANY,
*Appellee.*

# ARGUMENT OF JOHN F. DILLON FOR APPELLEE.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

# Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1073.

THE UNITED STATES,
Appellant,

vs.

THE CALIFORNIA AND OREGON LAND COMPANY,
Appellee.

## ARGUMENT OF JOHN F. DILLON

**for the appellee in support of the proposition: That the Governor's certificate is conclusive in favor of bona fide purchasers for a valuable consideration, and that the California and Oregon Land Company is such a purchaser.**

## I.

**Governor's certificate conclusive in favor of bona fide purchasers for value. Herein, nature and effect of a grant in presenti, showing that it vests the legal title in the grantee and his assigns; that the grant is on a condition subsequent, which condition remains annexed until the same is performed, but no longer; that the only restriction on the State's power to sell is removed when the Governor's certificate is made and filed; that thereupon the State has the complete jus disponendi, and its grant or conveyance vests in the purchaser an indefeasible title depending upon no condition whatever, and no power to forfeit the lands thereafter exists.**

THE LANGUAGE OF THE GRANT OF LANDS by Congress to the State of Oregon to aid in the construction of this military wagon road is precisely the same as that contained in many acts granting lands to States to aid in the construction of railways or other improvements therein. The words of the grant under consideration are

"That there be, and there is, hereby granted to the State of Oregon to aid, &c., alternate sections of public land designated by odd numbers, for three sections in width, on each side of the road, &c."

These words have been time and time again construed by the Supreme Court of the United States, and their legal effect is well ascertained. This legal effect

has a most material bearing upon the relief sought by the bill as well as upon the plea of the defendant company on which the decree now appealed from rests. I do not conceive it to be necessary to refer to all of the many cases decided upon the point by the Supreme Court of the United States:

"There be and is hereby granted" are, says the Supreme Court, "words of absolute donation, and import a grant *in presenti*. This Court has held that they can have no other meaning, and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant. Railroad Company vs. Smith, 9 Wall., 95; Schulenberg vs. Harriman, 21 Wall., 60; 1 Lester, 513; 8 Opin., 257; 11 *Id.*, 47. They vest a present title in the State of Kansas, though a survey of the lands and the location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the *same effect upon the selected parcels as if it had specifically described them.* In other words, the grant was afloat until the line of the road should be definitely fixed." Per Mr. Justice DAVIS, in Leavenworth, &c., Railroad Company vs. United States, 92 U. S., 788, 741.

It is settled law that these words constitute a grant *in presenti*, whereby the legal title in fee vests in the State subject only to be defeated by Congress if the road described in the Act is not built, but until thus defeated the grant remains in force, notwithstanding the failure of the State or its grantee to perform the condition. Schulenberg vs. Harriman, 21 Wall. 44; Tucker vs. Ferguson, 22 Wall. 527; United States vs. Leavenworth, &c., Railroad Company, 92 U. S., 745; Grinnell vs. Railroad Company, 103 U. S., 739. But a sale by the State under the authority and upon the conditions specified in Section 4 of the Act (see text of

the Act in Appendix hereto) would defeat the right to forfeit. This will be hereafter shown.

The observations of Mr. Justice MILLER in the last-named case, where the facts were such as to require a careful consideration of the meaning of the phrase "a grant *in presenti*," are especially noteworthy, for they were made in a case where the road was constructed on a different route from the one laid down on the map filed in the Interior Department. The learned Justice says:

"The grant (to the State of Iowa) under the Act of 1856, was, as has been often said, a grant *in presenti*, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever this is done so that the surveyor or the officers of the Land Department can protract the line of the route on the maps of the public lands within the limits of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant. So far as lands are found in place where this is done, not coming within the exceptions as sold or held under pre-emption, the title, or at least the right to this land in place, is at once vested in the State or in the Company to which the State has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road which is filed in the General Land Office under provisions of the Statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or parts of a section until the selection is made and reported to the Land Office, and possibly not then until the selection is approved by the proper officer."

The Deseret Salt Co. vs. Tarpey, 142 U. S., 241, was an action of ejectment. The plaintiff's title was as lessee of the Central Pacific R. R. Co. The defendant

objected to the title on the ground that the plaintiff showed no patent or conveyance, and the Government grant by Act of Congress, together with the subsequent filing of the map of definite location, was no sufficient title on which to found ejectment: it was held, however, that that plaintiff's title was sufficient. Mr. Justice FIELD says:

"By the terms of the Act making the grant, the contention of the defendant is not supported. Those terms import the transfer of a present title, not one to be made in the future. They are that 'there be and is hereby granted' to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted as they are described by the sections mentioned. * * * They import a grant *in presenti*, carrying at once the interest of the grantor in the lands described. * * * The grant was, therefore, in the nature of a 'float;' but when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached us of the date of the grant. * * * THE TITLE TRANSFERRED IS A LEGAL TITLE AS DISTINGUISHED FROM AN EQUITABLE OR INCHOATE INTEREST."

S. P. Wisconsin Cent. R. R. Co. vs. Price County, 133 U. S., 496, 507, where it is said that even Congress cannot forfeit the grant except for non-performance of the work within the period designated.

The exact language of the learned Justice is as follows:

"The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant."

So in St. Paul and Pacific vs. No. Pacific, 139 U. S., 1, this Court (FIELD, J., giving the opinion) in construing this grant says:

"The language of the statute is 'that there be and "'hereby is granted' to the company every alternate "section of the land designated, *which implies that the "property itself is passed, not any special or limited "interest in it. The words also import a transfer of a "present title, not a promise to transfer one in the future.* "The route not being at the time determined, the grant "was in the nature of a float, and the title did not "attach to any specific sections until they were capa- "ble of identification; but when once identified, the "title attached to *them as of the date of the grant*, ex- "cept as to such sections as were specifically reserved. "It is in this sense that the grant is termed one *in "praesenti*."

The cases above referred to, decided by the Supreme Court of the United States, also establish a point which has a material bearing upon both the case made by the bill and the plea of the defendant company on which the cause was decided below, viz., that a grant in this form to aid in the building of a road is what is technically known as a grant on a *condition subsequent*. That is the estate or title to the lands granted vests in the grantee, subject to being defeated if the road is not built, and if the lands have not been sold as authorized by Section 4 of the Granting Act (see Appendix for text of that Act). If built, the condition is performed and the title becomes absolute and indefeasible. If not built, the title to all lands not validly aliened under the authority of the granting act remains in the State or its grantee until the United States elects to assert the forfeiture. The General Government alone can take the advantage of a breach of the condition. These principles have ceased to be

disputable and have become fundamental and elementary.

The Act of Congress of March 2, 1889 (25 Stats. 850), in virtue of which the bill of complaint in this cause was filed, and the structure, purpose and prayer of the bill are founded upon the principle that the legal title to the lands in question is in the defendant company, viz., the California and Oregon Land Company, in virtue of the grants, lists, patents and conveyances set forth in the bill of complaint. The relief which the act authorizes to be sought, and which the bill accordingly seeks, is, that the said lands if not earned be forfeited, the patents set aside, and the same restored to the public domain; but the act expressly "saves and preserves the rights of all *bona fide* purchasers for a valuable consideration, if any such there be" (25 Stats., p. 851).

It is incontrovertible, therefore, that the legal title to the odd-numbered sections in place within the three-mile limits on each side of the road vested in the State at once when the map of the route of the road was filed and approved, which the lists and patents referred to in the bill show was done, and that the title thus vested relates back to the date of the grant, and that the title of the State to the indemnity lands accrued when the selection was made and reported to the Land Office and approved by the Secretary of the Interior. The lists and patent set out in the bill show such selection and approval. It is equally clear that, the legal title being in the State, the grant of the State to the Oregon Central Military Road Company by the Act of October 24, 1864 (Record, p. 307), vested in that company the legal title, and that title by the mesne

conveyances passed to and vested in the California and Oregon Land Company. This is so upon the general principles of the law relating to estates upon condition subsequent, is recognized to be so by the Supreme Court in the cases before cited, by the said Act of Congress of March 2, 1889 (25 Stats., 850), and by the bill of complaint in this cause.

Mr. Washburn, summarizing the law upon this point, says:

"The circumstance of an estate being subject to a condition does not affect its capacity of being aliened, devised or descending in the same manner as an indefeasible one, the purchaser or whoever takes the same by devise or descent taking it subject to whatever condition is annexed to it" (2 Washburn on Real Property, Ch. 14, "Estates upon Condition," 4 Ed., page 23, pl. 24).

Thus the State may, before the construction of the road, grant the lands to a company or an individual, and the grantee may, as is usual, alien and mortgage the estate granted, as in the case of Grinnell vs. The Railroad Company, *supra*, and many others; but, of course, the condition remains annexed to it until it is performed or waived, *but it remains annexed no longer* (Jerome vs. McCarty, 94 U. S., 734; Kennedy vs. Railroad Company, 2 Dillon, 448); and no condition exists as against the grantee of lands sold after the Governor's certificate is made and accepted by the Secretary of the Interior.

It is elementary law, that if the trustee holding the legal title conveys the land, the legal title passes to the grantee. If the grantee buys for value and without notice of the trust, he holds it free from the trust. This is recognized by the Act of March 2, 1889, which

expressly saves the rights of *bona fide* purchasers. If he gives no value, or has notice of the trust, the conveyance of the legal title is operative to pass the legal title, but the grantee's conscience is affected, and, in contemplation of equity, he succeeds to the trust reposed in the original trustee (Hayes on Conveyancing, Chap. III., Perry on Trusts, Sec. 334; Cowell vs. Springs Co., 100 U. S., 55, 58).

And the legal title will not be divested, even at the instance of the United States, where it would be inequitable to the holder of the legal title (United States vs. Flint, 4 Sawyer, C. C. R., 42, 58). Mr. Justice FIELD there says:

"The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant, they waive this exemption, and stand on the same footing with private individuals. And when they go into a court of equity, they must equally present a case by allegation and proof, entitled them to equitable relief. * * * All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him."

See also

Grinnell vs. Railroad Company, 103 U. S., 739, 744; Maxwell Land Grant Case, 121 U. S., 381.

United States vs. Burlington & Mo. R. R. Co., 4 Dillon, p. 302; affirmed, 98 U.S., 334 and p. 342.

Where the State grants or disposes of the lands (other than the first thirty sections), before the construction of the road, or the certificate of the Governor of such construction, the right of the grantee is subject to the condition subsequent annexed to the grant.

But, in the case of the sale by the State of the first thirty sections, or of other sales made after the Governor's certificate of completion is filed with the Secretary of the Interior, the sale is (as I shall now proceed to show) of an absolute and unconditional estate. In either case the legal title is in the State's grantee, who, in the one case, has an indefeasible estate, and, in the other, a defeasible estate until the Governor's certificate is made and filed, but not thereafter defeasible.

## The Title of the California and Oregon Land Company is Absolute and Indefeasible.

I NOW UNDERTAKE TO SHOW THAT THE TITLE TO THE LANDS IN QUESTION IS IN THE ASSIGNEE OF THE STATE, TO WIT, THE CALIFORNIA AND OREGON LAND COMPANY, AND THAT SUCH TITLE IS ABSOLUTE AND INDEFEASIBLE. We have already seen that the legal title to the lands in place, and the indemnity lands selected and approved by the Secretary of the Interior, vested in the State of Oregon. The Act of Congress prescribes and regulates the State's power of disposition (Sec. 4). It authorizes (Sec. 4), thirty sections to be sold in advance of any construction, and then proceeds to annex a single restriction upon the power of further sales by the State, in these words: "*When* the Governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, *then* another quantity of land hereby granted, not to exceed thirty sections, may be sold," &c. OBSERVE that this provision presupposes and assumes that the title is in the State of Oregon. This must not be overlooked

or forgotten. To the thirty sections authorized to be sold by the State in advance of construction, the grantee of the State takes an absolute and unconditional title, although no part of the road is then built, and his title is not affected by the failure to build the road, or by the subsequent resumption or forfeiture of the grant. Even Congress could not forfeit such lands even if the road was never built, and this is because there is no *condition* annexed to the grant of the 30 sections. This is expressly adjudged in the Railroad Land Company vs. Courtright, 21 Wall., 310. This judgment and the principles upon which it rests have a controlling effect in the present cause as to all the lands held by the California and Oregon Land Company, as I shall show.

The Act requires no patent to issue, but contemplates and provides that the title vests, as before shown, in the State, from the date of the grant and by virtue of the granting Act without any patent. No patent is necessary.

> Deseret Salt Co. vs. Tarply, 142 U. S., 241.
> Wisconsin, &c., Co. vs. Price Co., 133 U. S., 496.
> St. Paul, &c., Co. vs. Nor. P., &c., Co., 139 U. S., 1, 6.

The only restriction in the Act is upon the State's power of disposition of the lands thus granted; and here the provision is that the State may sell the land "from *time to time* till said road is completed," whenever "the Governor of the State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed" (Sec. 4).

OBSERVE WITH CARE that the act gives to the Secre-

tary of the Interior no power to ascertain in ANY OTHER MODE THAN BY THE GOVERNOR'S CERTIFICATE whether the road has been completed. He is not authorized to institute an inquiry *de novo* upon this subject. No machinery is provided for any such investigation. He is not empowered to inquire into the truth of the Governor's certificate, nor to revise or overrule the Governor's decision. Nor is the validity or effect of the Governor's certificates, when made, at all dependent upon any action in respect thereto, which the Secretary of the Interior may take or decline to take, but, if it were so, the Secretary of the Interior has accepted the certificates and acted upon them. The United States was dealing with the State of Oregon, for whose benefit the grant was largely made, and trusted to its interest and its good faith (Courtright's case, *supra*). Congress said in effect: "Whenever your Governor certifies to the Secretary of the Interior that any ten continuous miles of said road are completed, the restriction on the State's complete *jus disponendi* of thirty additional sections is at an end, and the State may then proceed to sell and convey them." At the very least, the Governor is *pro hac vice* the representative of the United States as well as of the State to determine the question of completion. And if the State does, after the making of the Governor's certificate, sell, its grant or conveyance vests in the purchaser as absolute a title thereto as its grant or conveyance of the first thirty sections vested. It is then brought precisely within the doctrine of Courtright's case, above cited, and any title granted or conveyed after the making and filing of the Governor's certificate is an *inde-*

*feasible title depending upon no condition whatever.* The power to forfeit for breach of condition is forever gone.

The General Government, by its certified lists and patent, declared that the State's right to sell had accrued, and that its title and that of its assignee had become perfect. When the Governor's certificates were made and filed with the Secretary of the Interior, the only restriction on the power of the State to sell further lands to the authorized extent was at an end, and thereupon the State could exercise the power of disposition, and its sale would convey an absolute and unconditional and, therefore, indefeasible title. Such a purchaser is not required to look beyond, and may securely rely upon the Governor's certificate. His title is founded upon a rock and is unassailable by the State or the United States, except for fraud on his part or of which he had actual knowledge. Is this not clear? Recur to the fourth section of the act, and it will be found devoted to the subject of the power of the State to sell the granted lands. It first authorizes an unconditional sale of thirty sections in advance of construction. No more shall be sold until "the Governor shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, *then* another quantity of land, hereby granted, may be sold, not to exceed thirty sections, and so, from *time to time*, until the said road is completed; and, if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States" (Sec. 4).

The object of the foregoing provisions is plain. The State might have made a contract to pay for

the construction of the road in cash, and have sold for cash the lands at public or private sale. To enable the lands to be used by the State to provide the means of construction, Congress authorized the State to sell. To prevent the State from selling the lands *en masse*, and at once and in such a way as that, although the lands had been disposed of, the road might not be built, the above restriction on the power of sale was imposed.

Wisconsin Cent. R. R. Co. vs. Price Co., *supra*.

IT WAS OF COURSE INTENDED BY THESE PROVISIONS, WHEN A SALE IS MADE AFTER THE GOVERNOR'S CERTIFICATE IS FILED, THAT IT SHALL BE OF AN ABSOLUTE AND PERFECT TITLE. This was the plain purpose of Section 4. The certificate is the chosen and appointed test and evidence of the power to sell. This is its only purpose. It has no other meaning. What other object can be suggested? If a sale is made after the certificate is filed, it is, of course, meant that it shall be of an absolute title. Hence, the provision that in case of forfeiture only the "land remaining *unsold* shall revert to the United States." Only such unsold lands can be forfeited for breach of condition. When the Governor's certificate is filed with the Secretary of the Interior, the power of the State to sell exists. A purchaser from the State, or any one deriving title under such purchaser, as in this case the California and Oregon Land Company, is not bound to look beyond the Governor's certificate, and ascertain at his peril whether it is or is not true. I repeat that the Governor's certificate is the chosen and appointed test and evidence of the power to sell. It is

little less than absurd to say that an intending purchaser must look behind the certificate, visit the road, 300 miles long, or make an *aliunde* inquiry to see whether or not it was completed. Who would buy the lands if such a burden was imposed on the purchaser? The Act imposed no obligation to keep the road in repair, and how could a purchaser know or learn five or ten years afterwards whether the road had been completed or not? The Circuit Court, therefore, rightly rejected, under the plea and the issues raised thereon, the testimony offered by the United States (see Record, pp. 285, 286). The Governor's certificate is the accredited and official test of the power of the State to sell, and a muniment of the purchaser's title. *In his favor it is conclusive and incontestable.* Of him the statute requires nothing further. It is absolute and unimpeachable verity.

The Special Act of Congress of the 18th day of June, 1874, quoted in the bill of complaint (Record, p. 12), in relation to these very lands, goes upon the principle, and reaffirms it, that the Governor's certificate of completion is the evidence, and only evidence, required as to the construction and completion of the road. The Act enacts that where such certificates show the construction and completion of the roads "that patents for said lands *shall* issue in due form to the State of Oregon [and to its assignee] as fast as the same shall, under the said grants, be selected and certified."

When Congress authorized and directed patents to issue on such proofs, and when the purpose of such proofs and patents were to authorize sales of the lands by absolute title, how can it reasonably be contended that intending purchasers were bound to look beyond

the official record and ascertain at their peril whether the road had in point of fact been completed? I shall recur to this subject in a subsequent part of this brief, where I discuss the question of *bona fide* purchasers.

We have present all of the elements of the most solemn and conclusive estoppel. Any other view destroys the security of titles and leaves them indefinitely exposed to the uncertain results of an unauthorized inquiry, such as the United States sought to have made in the present case as against the *bona fide* purchaser of the State's title.

THE SECURITY OF TITLES resting upon the action of the Governor and of the Interior Department, resulting in certified lists and patents, is of the utmost importance. The doctrines of this Court on this subject are founded on the highest wisdom.

In the Maxwell Land Grant Case, 121 U. S., 381, which was a suit by the United States to annul a patent granted by the Government on the ground of false representations, Justice MILLER said:

"In this class of cases the respect due to a patent, "*the presumption that all the preceding steps required by* "*the law had been observed before its issue*, the immense "importance and necessity of the stability of titles de- "pendent upon these official instruments, demand that "the effort to set them aside, to annul them, or to "correct mistakes in them should only be successful "when the allegations on which this is attempted are "clearly stated and fully sustained by proof. It is not "to be admitted that the titles by which so much prop- "erty in this country and so many rights are held, "purporting to emanate from the authoritative action "of the officers of the Government, and, as in this case, "under the seal and signature of the President of the "United States himself, shall be dependent upon the "hazard of successful resistance to the whims and "caprices of every person who chooses to attack them

" in a court of justice ; but it should be well under-
" stood that only that class of evidence which com-
" mands respect, and that amount of it which produces
" conviction, shall make such an attempt successful."
U. S. vs. San Jacinto Tin Co., 125 U. S., 273.

In another case Mr. Justice BREWER says :

" Even if this be regarded as a bill brought by the United States simply to protect its own interests and recover its own property, still it is well settled that where relief can be granted only by setting aside a grant, a patent or other evidence of title issued by the Government, in the orderly administration of the affairs of the Land Department, the evidence in support must *be clear, strong and satisfactory.* Muniments of title issued by the Government are not to be lightly destroyed " (United States vs. Des Moines, &c., Co., 142 U. S., 510, 541, and cases cited).

**Adjudged cases in support of the proposition that the Governor's certificate and action of the Interior Department thereon, are conclusive in favor of bona fide purchasers for value.**

These conclusions appear to my mind so plain upon the face of the granting act, and from the nature of the case, that it seems scarcely necessary to fortify them by reference to judicial determinations. They will, however, be found fully supported by judgments of this Court of conclusive, and not simply persuasive, force. The principle here applicable is *the well-known doctrine in our law that when a special officer or tribunal is*

*authorized to determine a given matter of fact, the decision of the officer or tribunal is final, unless otherwise declared by the law itself, or unless it can be impeached by fraud.*

This principle has been many times asserted by this Court, and it is one of wide, constant and salutary application under the laws of the United States, in respect of the disposition of its public lands. It has, perhaps, been nowhere more clearly and decisively expressed than in the judgment of the Supreme Court, in the case of Johnson vs. Towsley (13 Wall., 72, 83). It is there said by Mr. Justice MILLER (a Judge who was very familiar with the land laws of the United States):

"That, when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public land subject to sale by pre-emption or otherwise *is conclusive of the legal title* must be admitted under the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control, either by reasons of the limited powers of the Court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and to correct mistakes, injustice and wrongs in both judicial and executive actions, however solemn the form which the result of that action may assume when it invades private right; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the Crown, or other executive branch of the Government, have been corrected or declared void, or other relief granted."

The case of Doe vs. Wilson, 23 Howard, U. S., 457, 180, so analogous to the one under consideration, and decisive of the conclusiveness of the Governor's certificate in favor of the grantees of the State, that I may be justified in stating it with some fullness. It there appeared that by a treaty made by the United States with the Pottawatomie tribe of Indians, October 27, 1832, the nation ceded to the United States certain lands. Many reservations were made in favor of Indian villages and individual Pottawatomies. These reservations were to be sections lying *within various parts of the ceded territory.* The United States agreed that they would issue patents to these respective reservees. The treaty provided that the foregoing reservations should be selected under the direction of the President of the United States, after the lands shall have been surveyed, and that the boundaries should correspond with the public surveys. In 1833, before the surveys were made, one of the reservees, named Pet-chi-co, to whom two sections were reserved, granted all of these two sections of land lying in the State aforesaid, in the region of country or territory ceded by the treaty of October 27th, 1832, with warranty. The defendants held title under this deed. The plaintiff took a deed from Pet-chi-co's heirs in 1855. It was contended that the lands embraced in the *patent* to Pet-chi-co, made in 1837, *did not lie within the section of country ceded* by the treaty of October 27, 1832, and, therefore, the Court was asked to instruct the jury that the defendants cannot claim or hold the land as assignees of Pet-chi-co by virtue of the treaty. This instruction was refused. Mr. Justice CATRON, in delivering the opinion of the Court, said :

"There is no evidence in the record showing where the land granted by the patent lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf; that the selection for him of Sections 9 and 10 had been made, 'as being the sections to which the said Pet-chi-co is entitled' under the treaty. *The recitals in the patents conclude all controversy on this point.*"

Subsequently, the same question under the same treaty came before the Supreme Court in the case of Crews and Sherman vs. Burcham, 1 Black, 352, where a patent had issued to a reservee by the name of Besion. It was objected to his title that the patent was void, because the land embraced in it was outside of the district or country ceded by the treaty. Mr. Justice NELSON disposed of the objection in the following language:

"An objection was taken that a portion of the half section embraced in the patent to Besion did not lie within the district of country ceded by the treaty. The same objection was taken in the case of Doe vs. Wilson, and the answer given was that the recitals in the patent, that the sections were those selected by the President, and to which the reservee was entitled under the treaty, were conclusive on the point; and we may add that certainly no third party has any right to complain if the facts were as alleged."

The same principle applies to the powers and duties of the Secretary of the Interior in respect of the indemnity lands under the Amendatory Act of December 26, 1866.

The Secretary of the Interior is appointed by the Statutes of the United States to approve the selections of indemnity lands; he has approved the selections to the State, and the title thus vested in the State rests

upon the same basis as the title to the lands "in place."

The case of French vs. Fyan, 93 U. S., 169, presents an instructive and apposite application of the same principle. In the case just cited, it appeared that in 1850 Congress passed the Swamp Land Act. In 1852, it passed an act granting certain lands to the Missouri Pacific Railroad Company. The lands in dispute in that case were selected as being both within the Swamp Land Grant and the Railroad Grant. The United States certified or patented the tracts under both acts. The plaintiff held under the Railroad Grant, and the defendant under the Swamp Land Grant. On the trial of an ejectment action brought by the plaintiff, it was offered to be proved by witnesses, who had known the land in dispute since 1849 until the time of the trial, that said land was not swamp or overflowed land, and, therefore, was not within the Swamp Land Grant. But the Court held that the patent issued under the Swamp Land Act, which made it the duty of the Secretary of the Interior "to make out an accurate list and plats of the land covered by the act, and to cause a patent to be issued to the State therefor," could not be impeached by evidence showing that the land which it conveyed was not in fact swamp or overflowed land; and that the decision of the Secretary of the Interior, evidenced by the issue of the patent, was absolutely controlling in a court of law with a strong imitation that this conclusive effect in such a case could not be denied even in equity.

The principle here involved is thus stated by Mr. Justice FIELD, than whom no judge is more conversant

with our public land laws, in Shepley vs. Cowan, 91 U. S., 330, where it is said :

"The rulings of the Land Department on disputed questions of fact, made in a contested case as to the settlement and improvements of a pre-emption claimant, are not open to review by the Courts when collaterally assailed. The officers of the Land Department are specially designated by law to receive, consider and to pass upon proofs presented with respect to settlements upon the public lands with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annuled by the Courts when a controversy arises between private parties, founded upon their decisions. But, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the Department, and perhaps, under special circumstances, to the President."

The same doctrine is applied and fully expounded in the United States vs. Schurz, 101 U. S., 378. Here a homestead entry, followed by a patent, was made of lands, which were *not* subject to such homestead entry, because under the Act of March 2d, 1867, the land thus entered was within the limits of an incorporated town; and it was thereupen contended that the patent was void; that no title whatever passed by force thereof. But the Supreme Court held otherwise, and that the patent was at most voidable. The reasons for the judgment of the Court are relevant to the subject under consideration, and are thus stated by Mr. JUSTICE MILLER :

"It is argued with much plausibility that the relator (the pre-emptor and patentee) was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is,

therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land. We are not prepared to say that, if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one. But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry and sale. The question whether any particular tract belonging to the Government was open to sale, pre-emption or homestead rights, is, in every instance, a question of law, as applied to the facts for the determination of those officers. Their decision of such questions and of conflicting claims to the same land by different parties is judicial in its character.

"It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearing in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of a patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held possession, it might be held void in a Court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other per-

sons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void. * * *

"From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers can not restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deed destroys his title."

THE CONCLUSION, therefore, results, and it is one concerning which there would seem to be no doubt, that the Governor's certificate of the completion of the road, especially when accepted and acted on by the Secretary of the Interior, who listed and patented the lands, is conclusive in favor of the *bona fide* purchasers from the State; that the title of such purchasers cannot be defeated by any action of the State or of Congress, or by an inquiry in the courts upon extrinsic testimony as to the truth of that certificate, nor by proof

showing that the road was not constructed as required by the Act of Congress.

## II.

**The California and Oregon Land Company is a bona fide purchaser for a valuable consideration of the lands in question, and as such protected from the decree here sought, not only by the principles and rules of equity, but also by the express provisions of the Act of March 2, 1889, in virtue of which this suit is brought.**

I have shown in the foregoing discussion that the United States is not entitled to any relief as against the California and Oregon Land Company, by way of forfeiture, on the ground that there has been a breach of the condition subsequent on which the grant was made; that is, a failure to build the wagon-road in the time or manner required by the Act of Congress. This leaves only available to the United States the single ground of relief that the Governors' certificates were procured by fraud; that such fraud was a fraud upon the United States, and that the present holder and owner of the title, to wit, the California and Oregon Land Company, had notice of such fraud at the time when it purchased and obtained a conveyance of the lands.

The bill in this case alleges actual fraud in the pro-

curing of the certificates, and alleges distinctly (Record, p. 17) that the defendants, including the California and Oregon Land Company :

"Had full knowledge that the road provided for by the Act of Congress had not at any time been constructed and maintained as required by the said Act of Congress, * * * and well knew the statements made in the certificates of the Governors and Acting Governors of Oregon, hereinbefore set forth, were false ; that the Governors and Acting Governors did not at any time whatsoever examine the road referred to in the certificates, and that the said certificates had been procured by the false and fraudulent represe tations as aforesaid ; and that the patents aforesaid were procured to be issued upon said false and fraudulently procured certificates."

It is not a case where the title was procured by fraud, for the title to these lands, as above shown, vested in the State of Oregon, and by its act in the Oregon Central Military Road Company, by the force and effect of the Act of Congress and the grant of the State to that company.

The case is that the Governor's certificates were fraudulently procured and made, and that the California and Oregon Land Company had notice thereof. In short, the ground of relief is an alleged case of actual fraud. This case must be proved or the bill fails. The rule on this subject is well settled. Mr. Justice CURTIS thus states it in Fisher vs. Boody, 1 Curtis C. C. Rep., 206, 211 :

"I assent to the rule laid down by the Lord Chancellor in Price vs. Berrington (7 Eng. L. & E. Rep., 254), that when a bill sets up a case of actual fraud, and makes that the ground of prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts, quite independent of the fraud, which

might of themselves create a case under a distinct head of equity."

S. P. Bank vs. Stone, 2 R. I., 221; Daniell's Chan. Pl. & Pr., 4th Ed., 328, note.

The case made by the bill was met by the plea of the California and Oregon Land Company, in due form, that it was a *bona fide* purchaser of the lands for a valuable consideration (Record, p. 81). Amended (pp. 131, 132). This plea was supported by an answer. There was a replication thereto taking issue thereon (Record, p. 104). Proofs were fully taken on the plea. The Court found in its decree (Record, p. 133) that the defendant the California and Oregon Land Company

"is the purchaser of the land described in the bill from the Oregon Central Military Road Company, in good faith, for a valuable consideration, and without notice of any fraud or misrepresentation on the part of the Oregon Central Military Road Company or any one else. It is, therefore, ordered, adjudged and decreed, that the plea of the said defendant be, and the same is hereby, sustained, and that the bill of complaint be, and the same is hereby, dismissed as to the defendant the California and Oregon Land Company."

It is unnecessary to go into the general doctrines of equity at large concerning *bona fide* purchasers for value, for the very Act of Congress of March 2, 1889 (25 Stats., 850), in virtue of which the present bill was filed, expressly "saves and preserves the rights of all *bona fide* purchasers for a valuable consideration, if any such there be" (25 Stats., p. 851). This is a favored defense. Mr. Justice STORY says (Eq. Jur., Sec. 411):

"Indeed, purchasers of this sort [*bona fide* purchasers] are so much favored in equity that it may be said to be a doctrine now generally established that a *bona fide* purchaser for a valuable consideration, without notice of any defect in

his title at the time of his purchase, may lawfully buy in any statute, mortgage, or other encumbrance upon the same estate for his protection. If he can defend himself by any of them at law, his adversary will have no help in equity to set these encumbrances aside; for equity will not disarm such a purchaser, but will act upon the wise policy of the common law—to protect and quiet lawful possessions, and strengthen such titles."

So, again, Justice STORY says (Sec. 64*c*):

"It [equity] extends its protection equally, if the purchase is originally of an equitable title without notice, and afterwards, with notice, the party obtains or buys in a prior legal title, in order to support his equitable title."

The ground of this rule protecting *bona fide* purchasers is that it is impossible that any one can have a higher equity than the *bona fide* purchaser for value of the legal title, and hence no one can have an equity to defeat or take away the title of such a purchaser.

This is well-known elementary law. Pomeroy, Eq., Sec. 871 (at end), says:

"The affirmative reliefs of reformation and of cancellation are, however, subject to the limitation that they are never conferred against a *bona fide* purchaser for value without notice."

The *rationale* of this doctrine is thus expounded by this Court in Boone vs. Chiles (10 Peters, 210):

"This leads to the reason for protecting an innocent purchaser, holding the legal title against one who has the prior equity; a court of equity can act only on the conscience of the party; *if he has done nothing* that taints it, no demand can attach upon it *so as to give any jurisdiction*. Strong as a plaintiff's equity may be, *it can in no case be stronger than that of a purchaser* who has put himself in peril by purchasing a title, and

paying a valuable consideration, without notice of any defect in it or adverse claim to it."

See, also,

Lea vs. Polk Co. Copper Co., 21 How., 497, 498 (1858).

Croxall vs. Shererd, 5 Wall., 268 (1866).

It was intimated that this doctrine was applicable to such a suit by Mr. Justice MILLER, in Grinnell vs. Railroad Co. (103 U. S., 744), where he said:

"But the legal title is not in the Government, and, as we have already shown, the equity is more than doubtful."

In U. S. vs. B., &c., R. Co. (98 U. S., 342), the Court say:

"It, the United States, certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees."

In Colorado Coal Co. vs. United States, 123 U. S., 313, the Court said:

"It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it or those claiming under them with notice of it to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide purchaser for value without notice is perfect.*"

## Defense of Bona Fide Purchaser.

The grant of lands to the State is to aid it building the road. It may be admitted that by Section 2 the State holds these lands in trust for this purpose; that is, that it can dispose of the same only to aid it in building the road. It cannot appropriate them to any other purpose. This is the scope and extent of the trust. But by Section 4 the State may sell 30 sections at once free from any trust, and, after the Governor's certificate is filed, all lands sold are taken by the purchaser free from any condition or trust. In the nature of the case there can be no trust against a *bona fide* purchaser from the State. The State is the sovereign over all its highways, not the United States.

> Dillon, Munic. Corp. (4th Ed.), Sec. 656, and quotation there given from Chief-Justice GIBSON.

The grant was to the State to aid *it* in building a specified highway therein. The United States had simply the right or easement of free use therein reserved by Section 2. If the State is satisfied with the road, and the Governor certifies to the construction, that is the end of the matter so far as the United States is concerned, unless a fraudulent certificate is made by the Governor, and even in that case his certificate is conclusive in favor of a purchaser of the land, unless the purchaser was a party to the fraud or had actual knowledge of it. The bill alleges such a case against all of the defendants (Record, p. 17); but the California and Oregon Land

Company under its plea of *bona fide* purchaser disproved the fraud so far as it was concerned, and the United States did not attempt to meet the defendant's proof, and in the testimony which the Government offered (Record, pp. 284–286) it did not pretend or suggest that the California and Oregon Land Company was a party to the fraud, or that the Government could prove that it had actual notice thereof. The proofs established that the California and Oregon Land Company or its vendors, the California Syndicate, had no part in the making of the Governor's certificates or in the listing and patenting of the lands.

This is undisputed. Nothing, therefore, was left open to the United States but to prove that the California and Oregon Land Company had notice of the fraudulent issue of the Governors' certificates. This line of proof was open to the United States, and they resorted to it by cross-examining the members of the purchasing syndicate, and the other witnesses produced by the Land Company. The failure of the Government was complete. The testimony which the Government offered, and which was excluded (Record, pp. 284–286), was

> " to show that the road was never built as required by the Act of Congress, and that the certificates of the Governors that it was built and constructed were obtained by misrepresentation, *as charged in the bill.*"

These certificates were dated, respectively, July 27, 1866, November 26, 1867, and January 12, 1870; that is, the earliest one eight years, and the last one more than two years before the California purchasing syndicate had ever heard of these lands or had anything to

do with them. Their purchase of these lands was in May and October, 1874.

This line of proof was utterly idle unless the purchasing syndicate had actual notice of the misrepresentations by which the Governor's certificates had been obtained.

The Government attempted to prove such notice, and failed. There was no error, therefore, in rejecting the offered evidence. If all the facts thus offered to be proved had been proved, or if they be now regarded as conceded, still the decree below is right, if the defendant company or the California syndicate had no notice of these facts.

It is impossible not to feel the injustice of the present attack upon the title of the defendants, and difficult not to express with some warmth one's sense of wrong here attempted by the United States.

Note the dates:

July 27, 1866—Governor Gibbs' certificate of completion of first 50 miles (Record, p. 7).

November 26, 1867—Governor Woods' certificate of completion of 42½ more miles (p. 8).

January 12, 1870—Governor Woods' certificate of final completion.

Lands listed to the State as follows:

November 13, 1867—List No. 1 (Record, pp. 19–21).

April 21, 1871—List No. 2 (Record, pp. 21–28).

April 18, 1871—List No. 3 (Record, pp. 37, 38).

December 8, 1871—List No. 4 (Record, pp. 29–34).

December 8, 1871—List No. 5 (Record, pp. 40, 41).

April 3, 1873—List No. 6 (Record, pp. 35, 36).

March 29, 1873—List No. 7 (Record, pp. 42, 43).

July 10, 1883—Patent Record, pp. 44–52).

The Secretary of State certifies that all of the foregoing lists approved by the Secretary of the Interior "remain on file in the Executive Office" (Record, p. 308).

All these lands had been listed to the State long prior to the purchase by the California and Oregon Land Company and its immediate vendors. The State had made no complaint that the road had not been completed. It was applying for and receiving the lands for the completion.

On the 18th of June, 1874, Congress directed patents to issue on the Governor's certificate. And yet it is claimed (and that is all there is in this case) that it was the duty of the California syndicate in May, 1874, when they bought one-half, and in October, 1874, when they bought the other half, of these lands, to make an inquiry, *outside of the record evidence* of title, whether the road was or was not built and completed and into the *bona fides* of the Governor's certificates, and this although the purchasers had no notice of any facts to put them upon inquiry unless it was the form of the deed to them. The offer of proof by the United States, which was rejected, goes upon this false notion (Record, pp. 285, 286). And upon this false notion the dissenting opinion in this case rests (see Record, pp. 323, 324; also, p. 329).

The learned Judge (dissenting) says:

"It is not sufficient for the defendants to show that by reason of their failure to inquire they were ignorant of the failure of their grantor to earn the land according to the terms of the Act of Congress. They must prove that they did inquire, and that, notwithstanding the exercise of ordinary prudence and diligence on their part, they were misinformed and de-

ceived, and that they honestly believed their grantor had acquired a full and complete title to the land by having constructed and completed the wagon road" (Record, p. 329).

With great respect I must say that it is not possible that such can be the law in a case where actual and full payment in cash is proved, and where the purchasers and their counsel show that they actually relied on the Governor's certificates and the action of the Interior Department in the listing and patenting of the lands.

It is established by undisputed evidence that the vendors of California and Oregon Land Company, in making their purchase of these lands, expressly relied upon the Governor's certificate and the action of the Interior Department thereon in listing lands to the State. I repeat that this is proved by undisputed testimony.

Baker's Evidence, pp. 162, 163, 165.
Holbrook's Evidence, p. 184.
Carolan's Evidence, pp. 193, 196.
Bogg's Evidence, pp. 198, 199, 203.
Rideout's Evidence, pp. 214, 220.
Belcher's Evidence, pp. 253, 254, 255, 260.

Parks and Colby, the other purchasers, were shown to be dead (p. 267).

If a purchaser may not thus rely, the Governor's certificate and the action of the Interior Department ensnared them, and actively and actually operated to trap and defraud instead of to protect them.

**I proceed now further to show that the California and Oregon Land Company is a bona fide purchaser for a valuable consideration, and that the form of deed**

**accepted by it does not disentitle it to be so considered :**

The Government's case to defeat the plea of *bona fide* purchaser for a valuable consideration is rested in the dissenting opinion in this case solely on the fact that the deeds from the Oregon Central Military Road Company to Pengra, of date respectively 12th of May, 1874, and 12th of October, 1874 (Record, pp. 53, 58), are deeds of quitclaim only. This is doubtful, since the *habendum* is "to have and to hold *the lands* hereby granted" (Record, pp. 54, 60). Contemporaneously, however, with the execution of these deeds, Pengra executed on the 15th of May, 1874 (Record, p. 62), and on the 15th of October, 1874 (Record, p. 65), deeds of bargain and sale to Colby and others (the California purchasing syndicate) of the lands in question. On the 3d of March, 1877, the purchasing syndicate executed a deed of bargain and sale to the California and Oregon Land Company. The evidence in this case shows beyond question that the purchase from the Oregon Central Military Road Company was a purchase of the lands, and there were good reasons why the conveyances took the form in which they were executed. These are pointed out in the brief of Britton and Brown, and will be alluded to in the oral discussion.

I maintain that there is no principle of equity laying down inflexibly a cast-iron rule that a purchaser who is such in good faith and for value is disentitled to the protection of a *bona fide* purchaser simply because he has accepted a quitclaim deed.

A. Such a view is inconsistent with the purposes and

policy of the registry laws, and with statute of Oregon, 1854, in relation to quitclaim deeds (Genl. Laws, Oregon, p. 516, Sec. 3).

B. It is inconsistent with the purpose of the provision of the Act of Congress making of the Governor's certificate the official evidence of the right to sell.

C. It is contrary to the established doctrine of equity, which does not make rights dependent on the form in which instruments are framed, but upon the real and actual facts and the state of the conscience of the purchaser. The question in equity is: Did he pay value? Did he have notice of anything wrong?

The proofs in this case show, and they are undisputed, that the purchasers paid value, that they relied on the Governor's certificates and on the lists and patents issued by the Interior Department, and that they had no notice, knowledge or suspicion that the road had not been constructed as required by the Act of Congress, or that the Governor's certificates had been procured by fraud or misrepresentation. They are, therefore, to be protected, unless the mere fact (even if such were their true construction, which it is not) that the two deeds from the Oregon Central Military Road Company to Pengra were quitclaims, pure and simple, and that a purchaser under a quitclaim deed, even if he be a purchaser for value and without notice, cannot claim in law to be a *bona fide* purchaser for value.

This proposition I shall briefly discuss. It is supposed to rest upon the decisions of this Court in the case of Oliver vs. Piatt, 3 How., 410; Van Rensselaer vs. Kearney, 11 How., 297; May vs. Le Claire, 11

Wall., 217, 232; Villa vs. Rodriguez, 12 Wall., 323, 338; Dickerson vs. Colgrove, 100 U. S., 578; Baker vs. Humphrey, 101 U. S., 494; Haverick vs. Patrick, 119 U. S., 156. I have made a careful and critical examination of these cases, and feel confident that they establish no such rule. They are referred to in the margin.*

*Oliver vs. Piatt, 3 Howard, 333, 409–411. The Court found that Williams was not a *bona fide* purchaser for value. At pages 409, 410, Judge STORY gives the reasons for this conclusion at length. He concludes the discussion thus:

"The only reasonable conclusion seems to be that he [Williams] was in as full possession of all the facts as were his partners, Oliver and Baum."

As a makeweight, he then proceeds to add:

"Another significant circumstance is that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in the property; and, under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts."

In Van Rensselaer vs. Kearney, 11 How., 297, the deed of conveyance from Van Rensselaer to Penfield of January 1, 1795, which was there construed, contained no covenants of warranty; and, taking the grant and the *habendum* together, the deed was only of the right, title and interest of the grantor "in as full and ample a manner as the said John J. van Rensselaer now hath and enjoyeth the same." And yet it was held that this deed, taken in connection with the writings referred to, affirmed that John J. van Rensselaer had and conveyed a fee simple in the lands; and that his heirs were estopped from denying that he had that estate. And hence his contention that, as he had at that time only an estate for life, the deed operated only to convey this estate, and not the remainder over which he afterwards acquired, was not tenable. A full examination of the cases was made by Mr. Justice NELSON, from which he deduces the principle as follows (p. 325):

"The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth, on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin

The Supreme Court of Mississippi, in the case of Chapman vs. Sims, 53 Miss., 154 (1876), reviews the principal decisions of this Court, above referred to, and declares that they contain only *dicta* to the effect that a quitclaim deprives holder under it of the character of *bona fide* purchaser. CAMPBELL, J., says: "We conclude that there is no authority for the "proposition that a quitclaim deed in the chain of "title deprives him who claims under it of the char- "acter of a *bona fide* purchaser. There are *dicta* and "suggestions and inferences to that effect. But we "deny and repudiate the proposition as unsound and "insupportable on authority, principle or policy. We

---

or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies.

"The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one."

May vs. Le Claire, 11 Wall., 217, 232. The bill in this case charged that Cook had full notice of certain frauds of one Powers in making a sale under a deed of trust of May's property to Dessaint. Afterwards, on July 27, 1859, Dessaint conveyed to Cook. The only observation in relation to the form of the conveyance is in Mr. Justice SWAYNE's opinion at page 232, where he says:

"On the 27th of July, 1859, Dessaint conveyed by deed of quitclaim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title."

This was the whole point of the case. But the learned Justice adds, by way of makeweight, this:

"Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without

" concede that under some circumstances a quitclaim " deed may be a 'significant circumstance' in the con- " sideration of a combination of circumstances, of which " it may be a part, but this is the greatest force it can " possibly have in any case."

The rule seems to be clear and to be established that the equities arising from transactions required to be in writing and recorded are as effectually cut off by quitclaim as by any other form of conveyance (see Hope vs. Blair, 105 Mo., 85 ; Mansfield vs. Dyer, 131 Mass.,

---

notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey " (citing Oliver vs. Piatt, 3 How., 363).

The language of the so-called quitclaim deed does not appear. The burden of the case, as shown by the abstract of arguments and opinion, was fraud, and there was no discussion, and apparently no consideration of the question of the necessary effect of the quitclaim deed.

In Villa vs. Rodriguez, 12 Wall., 323, 338, the Court finds that a vendee whose rights lie in an executory contract is not entitled to be regarded as a *bona fide* purchaser for value, adding :

" This doctrine applies only where the legal title has been conveyed and the purchase money fully paid."

This decided the case, but the learned Judge proceeds as follows :

" This contract calls for a quitclaim deed. The result would be the same if such a deed had been executed and full payment made without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection " (citing May vs. Le Claire and Oliver vs. Piatt).

This was obviously dictum, and in no way essential to the decision of the case.

Mr. Justice SWAYNE, in Dickerson vs. Colgrove, 100 U. S., 578, repeats the same dictum. This was ejectment. The defendants were *bona fide* purchasers, and had been in possession eighteen years and eleven months. The Court below held that the action was barred by the Statute of Limitations and by an *estoppel in pais*. The Supreme Court expresses its conclusion thus (p. 582) :

" We think the facts disclosed in the record make a distinct case of *estoppel in pais* " against the plaintiff.

200; and authorities cited in the brief of BRITTON and BROWN).

The learned Judge who delivered the dissenting opinion in this case reviews the cases in this Court on this subject (Record, pp. 327–330). He alludes to the supposed conflict of authorities, and says (p. 328):

"Between these two extremes the true doctrine is to be found, and the trend of opinion in this country is in the direction of greater liberality and to regard with favor the more reasonable rule by which the actual good faith of the purchaser is made the test of his right in

---

That ended the case, but Mr. Justice SWAYNE adds this:

"Chauncey conveyed to the plaintiff in error by deed of quitclaim. He is not, therefore, a *bona fide* purchaser (Piatt vs. Oliver, 3 How., 333; May vs. Le Claire, 11 Wall., 217). Morton and the defendants were in possession. For both these reasons he took whatever title he acquired, subject to all the rights, legal and equitable, of Morton and of the defendants who deraigned their titles from the latter."

In Baker vs. Humphreys, 101 U. S., 494, an attorney was employed by both parties to an agreement for the purchase of land for the sum of $8,000; and, upon discovering a defect in the title, concealed the fact from one of the parties; and, in accordance with a secret agreement with the other, procured a conveyance by quitclaim for the sum of $25 to his own brother. The Court states these facts, and says (p. 499):

"It was the same thing in the view of the law as if the deed had been made to the attorney himself; neither of them was in any sense a *bona fide* purchaser."

And then adds as a makeweight:

"No one taking a quitclaim deed can stand in that relation (May vs. Le Claire, 11 Wall., 217)." This, and nothing more.

The case of Hanrick vs. Patrick, 119 U. S., 156, only decides that a covenant of general warranty in a deed of "all right, title and interest of the grantor in the premises described," there being no recital or statement as to the *quantum* of interest of the grantor, does not estop the grantor from asserting a subsequently acquired title; the Court professedly applying the principle of Van Rensselaer vs. Kearney, 11 How., 297. This was the only point decided in Brown vs. Jackson, 3 Wheat., 449.

equity, and the question of actual good faith is chiefly one of fact. So that there is no such thing as a conclusive presumption of *mala fides* from the mere acceptance of a quitclaim deed. * * * Nevertheless it is a true and self-evident proposition that by a quitclaim deed the grantee is necessarily warned. By agreeing to accept that form of conveyance he avowedly assumes all risk of a bad title as between himself and his grantor, and he may be fairly presumed to have made a timely and sufficient examination of the title. From this it follows that he may be conclusively presumed to have become informed of all facts which could have been discovered by an intelligent and earnest effort, and to have acted in the light of all such facts in making the purchase.

"Within this modification of the rule to which the Supreme Court seems to be committed, it is not sufficient for the defendants to show that by reason of their failure to inquire they were ignorant of the failure of their grantor to earn the land grant according to the terms of the Act of Congress. They must prove that they did inquire, and that, notwithstanding the exercise of ordinary prudence and diligence on their part, they were misinformed and deceived, and that they honestly believed that their grantor had acquired a full and complete title to the land by having constructed and completed the wagon road. This much, at least, is required of them to bring the case within any rule deducible from the cases cited in their behalf upon the argument. And for lack of such proof in the case, as it is now before this Court, the evidence is insufficient to sustain their plea."

The facts show, as I have pointed out in the foregoing discussion, that the California syndicate did make careful inquiry into the right of the vendors to sell. They procured the opinion of counsel. They examined the Governor's certificate and the action of the Interior Department. They caused an examination of the Recorder's Offices to be made, and took every precaution that any prudent purchaser could take in order to assure himself of the title which he was purchasing.

The proposition of the learned dissenting Judge that these purchasers were bound, if they accepted such a deed as the one they did accept, to make an actual examination in 1874 to ascertain whether part of this road had been completed in 1866, another part in 1867, and the final completion in 1870—from two to eight years before their purchase was made—and ascertain whether it had been built and completed according to the requirements of the Act of Congress, rests upon no foundation of reason (see United States vs. Des Moines Nav., &c., Co., 142 U. S., 510, as to *bona fide* purchasers).

I will not enlarge upon the discussion. Suppose that they made such an examination, how could they tell that the road had not been constructed as the Governor had certified? The Legislature of the State had regularly met, and no complaint had been entered. No complaint had been made that the certificates were false or fraudulent. The material point in this case is whether the purchaser had notice that any fraud had been practiced on the Governor to procure the certificates. Suppose the purchasers had made an examination of this road—300 miles long—and had even found evidences that the same or parts of it were not in a condition fit for use, what evidence would that be that their grantor had years before practiced a fraud on successive Governors of the State, and that their certificates were false and fraudulent? If a quitclaim deed gives warning to the purchasers of anything, it is only to make sure that the records, which are the repositories of the evidences of title, show that the grantor from whom they are pur-

chasing in good faith and paying full value, holds the title and has the right to convey the same.

IN SHORT, a quitclaim deed, aside from the statute of Oregon, is at most "a circumstance" in determining whether in point of fact any given purchaser is a *bona fide* purchaser for value or not. If it raises any presumption (which I deny), it is at most one of fact, and not of law. And, after all, the question in any case is whether, even if the purchaser holds under a quitclaim, he is a *bona fide* purchaser for value, without notice, in point of fact, of a defect in the title.

The statute of Oregon expressly enacts that deeds of quitclaim and release of the form in common use shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale. This puts quitclaims upon the footing of a deed of bargain and sale, and sweeps away all ground for the technical contention that a deed of quitclaim stands branded on its forehead. It eliminates from this case the doctrine that a quitclaim deed necessarily affects a purchaser with notice of any fact not disclosed by the records. Moreover, as shown fully in the brief of Messrs. BRITTON and BROWN and the facts under which the deeds were taken, the deeds in this case are not quitclaim deeds within the meaning of the rule relied on by his Honor the dissenting Judge.

JOHN F. DILLON,
For the California and Oregon Land Co.

# APPENDIX.

## Act of Congress Granting the Lands.

*AN ACT granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the Eastern boundary of said State* (13 Stats., 355).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon-road from Eugene City, by way of Middle Fork of Willamette River, and the most feasible pass in Cascade range of mountains, near Diamond Peak, to the Eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of said road:

*Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever; *and provided further*, that any and all lands heretofore reserved to the United States by Act of Congress or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted.

SEC. 2. *And be it further enacted*, that the said lands hereby granted to said State shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States free from tolls or other charge upon

the transportation of any property, troops or mails of the United States.

SEC. 3. *And be it further enacted*, that said road shall be constructed with such width, graduation and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

SEC. 4. *And be it further enacted*, that the lands hereby granted to said State shall be disposed of only in the following manner, that is to say: That a quantity of land, not exceeding thirty sections, for said roadway be sold; and, when the Governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed; and, if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States."

**Act of State of Oregon donating the above land grant to the Oregon Central Military Road Company. This act, after setting out verbatim the foregoing Act of Congress, then enacts as follows:**

*Be it enacted by the Legislative Assembly of the State of Oregon:*

SECTION 1. That there is hereby granted to the Oregon Central Military Road Company all lands, right of way, rights, privileges and immunities heretofore granted or pledged to this State by the Act of Congress, in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described in said Act of Congress upon the conditions and limitations therein prescribed.

SEC. 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State, to aid in the construction of such road, for the purposes and upon the conditions and

limitations herein mentioned, or which may be mentioned in any future grant of money or lands to aid in constructing such road.

SEC. 3. Inasmuch as there is no law upon this subject at the present time, this act shall take effect from and after its passage.

Approved October 24th, 1864.

[See text of all above reprinted in the Record at pp. 305–307.]

Act of Congress of June 18th, 1874, as to issue of patents, see Bill of Complaint, Record, p. 12.

148 U.S. 49

# RECORD, CASE NO. 15129.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1159.

THE UNITED STATES, APPELLANT,

vs.

THE DALLES MILITARY ROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

**FILED SEPTEMBER 8, 1892.**

# RECORD, CASE NO. 15129.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1892.

### TERM NO., 1159.

THE UNITED STATES, APPELLANT,

vs.

THE DALLES MILITARY ROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.


| | Page. |
|---|---|
| Transcript from United States circuit court | 1 |
| Citation and proof of service | 1 |
| Caption | 1 |
| Bill of complaint | 2 |
| Exhibit A. Certified copy of patent to The Dalles Military Wagon-Road Company, June 19, 1876 | 13 |
| Exhibit B. Certified copy of deed from The Dalles Military Road Company to Edward Martin, May 31, 1876 | 25 |
| Exhibit C. Certified copy of deed from Eleanor Martin, guardian, etc., to Peter Donahue and James Phelan, March 21, 1882 | 28 |
| Exhibit D. Certified copy of deed from James Phelan *et ux.* to Peter Donahue, August 3, 1882 | 32 |
| Exhibit E. Certified copy of deed from Peter Donahue *et al.* to the Eastern Oregon Land Company, August 11, 1884 | 35 |
| Subpœna | 44 |
| Appearance for Dalles Military Road Company, Kelly & Thornbury | 46 |
| Exceptions to bill | 46 |
| Appearance for defendants | 47 |
| Petition for leave to file double pleas | 48 |
| Answer of Edward Martin | 49 |
| Appearance for Eleanor Martin *et al* | 50 |
| Order granting petition to file double pleas and sustaining exceptions | 50 |
| Opinions on exceptions, Sawyer, J | 51 |
| Answer of Margaret A. Martin | 60 |
| Plea of D. V. B. Henarie *et al* | 61 |
| Answer of D. V. B. Henarie *et al* | 67 |
| Order granting leave to amend pleas | 75 |

Page.

Transcript from United States circuit court—Continued.
Answer of The Dalles Military Road Company *et al* ..... 75
Decree dismissing bill, February 18, 1890 ..... 87
Opinion of Sawyer, J., February 18, 1890 ..... 87
Order allowing appeal to Supreme Court of the United States ..... 98
Mandate of Supreme Court of the United States ..... 99
Decree on mandate ..... 100
Replication to answers and pleas ..... 103
Order to enter appearance of A. H. Tanner for plaintiff ..... 104
Appearance of A. H. Tanner for plaintiff ..... 104
Notice to take testimony ..... 105
Notice as to taking testimony ..... 106
Motion as to taking testimony ..... 106
Affidavit of Albert H. Tanner as to taking testimony ..... 107
Order as to taking testimony ..... 109
Order for commission to take testimony ..... 109
Order to file amended pleas and answers ..... 110
Amended plea of Henarie *et al* ..... 111
Amended answer of Henarie *et al* ..... 117
Replication to amended plea and answer ..... 127
Certificate of examiner ..... 128
Order on certificate of examiner ..... 130
Decree of dismissal as to The Dalles Military Road Company, etc ..... 131
Motion to set aside decree of dismissal ..... 132
Order setting motion for hearing ..... 133
Decree of dismissal as to Henarie *et al*, December 7, 1891 ..... 133
Order denying motion to set aside dismissal ..... 134
Assignment of errors ..... 135
Order allowing appeal to United States circuit court of appeals ..... 137
Commission to L. S. B. Sawyer ..... 137
Interrogatories to D. V. B. Henarie ..... 138
James Phelan ..... 140
D. P. Belknap ..... 141
Cross-interrogatories to D. V. B. Henarie ..... 142
James Phelan ..... 144
D. P. Belknap ..... 145
Deposition of D. V. B. Henarie ..... 147
D. P. Belknap ..... 153
James Phelan ..... 158
Exhibit A. Drafts of P. J. Martin and statement of drafts paid ..... 164
Exhibit B. Promissory note of Edward Martin to James Phelan, April 14, 1876 ..... 169
Commissioner's certificate ..... 170
Examiner's report of testimony ..... 171
Testimony of C. N. Thornbury ..... 172
P. J. Martin ..... 185
Mrs. Eleanor Martin ..... 204
Thomas P. Beach ..... 208
Donald Macleay ..... 213
Henry Hewett ..... 216
William Grant ..... 218
Ad. Edgar ..... 230
Examiner's certificate ..... 231
Certificate of clerk of United States circuit court ..... 231

| | Page. |
|---|---|
| Appearance for the United States | 233 |
| Appearance for the appellees | 233 |
| Order of submission | 234 |
| Opinion of Hawley, J. | 235 |
| Decree of affirmance, July 18, 1892 | 251 |
| Order allowing appeal | 252 |
| Certificate of clerk of United States circuit court of appeals | 252 |
| Citation and proof of service of same | 253 |

UNITED STATES OF AMERICA, } ss.
District of Oregon. }

To D. V. B. Henarie, Eleanor Martin, P. J. Martin, the Eastern Oregon Land Company, and the Dalles Military Road Co., greeting:

Whereas, the United States has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf,

Given under my hand, at Portland, in said district this 25th day of February, 1892.

MATTHEW P. DEADY,
U. S. District Judge.

UNITED STATES OF AMERICA. } ss.
District of Oregon. }

Due and legal service of the within citation is hereby admitted and accepted at Portland, in said district, this 26th day of February, 1892.

A. L. FRAZER,
Of Attorneys for Defendants.

[Endorsed]: Filed February 26th, 1892.

R. H. LAMSON, Clerk.

*In the Circuit Court of the United States for the District of Oregon, April Term, 1889.*

Be it remembered, that on the 29th day of August, 1889, there was duly filed in the Circuit Court of the United States for the district of Oregon, a Bill of Complaint, in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the District of Oregon.*

To the Honorable the Judges of the Circuit Court of the United States for the dirstrict of Oregon:

Comes now your orator, W. H. H. Miller, the attorney-General of the United States of America, and in virtue of the provisions of an Act of the Congress of the United States entitled "An act providing in certain cases for the forfeiture of wagon road grants in the State of Oregon", approved March 2d, 1889, exhibits and presents this Bill of Complaint in behalf of the United States and against the Dalles Military Road company, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevive E. Walker, and the Eastern Oregon Land Company, defendants.

"I. And thereupon your orator shows to your Honors that on the 25th day of February, A. D. 1867, the Congress of the United States passed, and the President duly approved an Act granting to the State of Oregon to aid in the construction of a wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Canyon City, Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, the alternate sections of public land, designated by odd numbers, to the extent of three sections on each side of said road. That said Act provided that the lands granted should be exclusively applied to the construction of the road and to no other purpose: That they should be disposed of only as fast as the work upon the road progressed: That lands lying within the limit fixed by said Act and theretofore reserved or appropriated should be reserved from the operation of said Act, except so far as it might be necessary to locate the road over the same, in which case a right of way to the width of one hundred feet was granted. That the said Act further provided that the grant should not embrace mineral lands of the United States, that the land granted thereby to the State of Oregon should be disposed of by the Legislature thereof for the uses and purposes therein set forth and for no other purposes, that the road should be and remain a public highway for the use of the United States, free from toll or other charges,

upon the transportation of any property, troops, or mails of the United States, and also that the road should be constructed with such width, gradation and bridges as to permit of its regular use as a wagon road and in such other special manner as the State of Oregon might prescribe: That the said Act also authorized the State of Oregon to locate and use in the construction of said road an additional amount of the public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from the general route of the road and equal to the amount reserved from the operation of the Act, said lien lands to be selected in alternate odd sections as provided therein: That said Act further provided that the lands thereby granted to the State of Oregon should be disposed of only in the following manner, that is to say: When the Governor of the State should certify to the Secretary of the Interior that ten co-terminus miles of said road were completed, then a quantity of land granted by the Act, not exceeding thirty sections, might be sold, and so on from time to time until said road should be completed, and if the road was not completed within five years, no further sales should be made and the lands remaining unsold should revert to the United States, and also that the Surveyor General of the District of Oregon should cause the lands granted by the Act to be surveyed at the earliest practicable period after the said State should have enacted the necessary legislation to carry the said Act of Congress into effect.

II. And your orator further shows to your Honors that on the 20th day of October, A. D. 1868, the Legislative Assembly of the State of Oregon passed, and the Governor approved an Act entitled, "An Act Dedicating Certain Lands to Dalles Military Road Company" which Act, after setting forth the Act of Congress aforesaid, granted to Dalles Military Road Company all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon, by said Act of Congress aforesaid, for the purpose of aiding said Dalles Military Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed: And further that the said Act of the said Legislative Assembly granted and pledged to the said Dalles Military Road Company all moneys,

lands, rights, privileges and immunities which might thereafter be granted to the State of Oregon to aid in the construction of said road, for the purposes and upon the conditions mentioned in said Act of Congress, or which might be mentioned in any further grant of money or land to aid in constructing said road: And said Act of the Legislative Assembly of the State of Oregon authorized the said Dalles Military Road Company to locate, subject to the approval of the Governor of the State of Oregon, the land within the ten mile limit prescribed by said Act of Congress aforesaid, in lieu of land reserved to or disposed of by the United States, and lying and being within the limits of the grant as described in the first section of the Act of Congress aforesaid.

III. And your orator further shows to your Honors that the State of Oregon never at any time passed any laws whatsoever for the special purpose of carrying the Act of Congress aforesaid into effect, but long before the passage and approval of said Act of Congress, on the 14th day of October, A. D. 1862, the Legislative Assembly of the State of Oregon passed an Act entitled "An Act providing for private incorporations and the appropriation of private property therefor," which was approved by the Governor of Oregon on said day last aforesaid, which Act provided among other things, that any road, other than a railway, constructed by a corporation formed under the said law, should be cleared of standing timber for thirty feet in width, that said road should have a track in the center not less than sixteen feet in width finished and kept in good traveling condition except when the cut of said road is six feet or more deep on either side, in which case said road need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of said narrow track. And said Act of the Legislative Assembly of Oregon last aforesaid also provided that all streams or other waters upon the line of such roads should be safely and securely bridged, except, where the County Court of the county wherein the line of such road may cross such streams, or other water, or if such stream or other water form the boundary between two counties, then the County Court of either of said Counties might authorize the corporation to place a ferry boat upon such stream or other water, to be kept and run for such toll as the County Court

might prescribe, and in the manner required of ferries established under the general statutes in relation to ferries: or except where such County Court might authorize such corporation to connect their road with a ferry, at the date of said Act or thereafter established over such stream or other water under the general statutes in relation to ferries, and that said provisions of said Act of the Legislative Assembly of the State of Oregon last aforesaid, have been in force at all times since the 14th day of October, 1862, and still remain in force.

IV. And your orator further shows to your Honors that the Dalles Military Road Company is a private corporation purporting to have been incorporated on the 30th day of March, A. D. 1868, under and by virtue of the general laws of the State of Oregon providing for private incorporations and the appropriation of private property therefor. That the enterprise and business in which the said corporation proposed to engage was the location and construction of a clay road from Dalles City in the County of Wasco, Oregon, by way of Camp Watson and Canyon City to a point on Snake River opposite Fort Boise, in Idaho Territory, about two miles below the mouth of Owyhee River. That James K. Kelly, N. H. Gates and Orlando Humason were the incorporators thereof.

That on the 11th day of January, A. D. 1871, the Dalles Military Wagon Road Company, by Orlando Humason, Victor Trevitt, O. S. Savage, O. W. Weaver, and B. W. Mitchell, the then directors thereof, in pursuance of the unanimous vote of the stockholders thereof made and filed supplementary articles of incorporation that said supplementary articles of incorporation contained but one article which is as follows:

"The enterprise and business in which the said corporation proposes to engage, in addition to the location and construction of a clay road as provided in the original articles of incorporation, is to accept and receive any and all grants of land and other things of value from the United States and the State of Oregon, and to sell and convey, and to purchase, and to hold land and other property which the directors of said corporation may deem necessary and convenient for the interest thereof: and to engage in any business incident to, and connected with receiving any such grant, and in selling, conveying, purchasing, and holding any land or property that may come

into the possession of said company, also to establish and keep a toll road on any part of the road belonging to said company."

That said private corporation is still in being, and that the officers thereof are James K. Kelly, President, and C. N. Thornbury, Secretary.

V. And your orator further shows to your Honors that on the first day of January, A. D. 1869, and on divers other days between said day and the 23d day of June, 1869, the officers, stockholders and agents of the Dalles Military Company and other persons acting in their interest and in the interest of said company, falsely and fraudulently represented to George L. Woods, then the Governor of Oregon, that said road had been constructed as by law required; they the said officers, stockholders, agents and representatives and other persons aforesaid, then and there well knowing that said representations were false and that the said road had not been constructed in any respect according to law or at all; that they and each of them made the said false and fraudulent representation for the sole and only purpose of fraudulently procuring from the said George L. Woods as Governor of the State of Oregon, a certificate declaring that the said road had been constructed in accordance with the Act of Congress aforesaid, approved February 25, 1867, and of the Act of the Legislative Assembly aforesaid, approved February 20, A. D. 1868.

That the said George L. Woods, then Governor of Oregon, in consequence of said false and fraudulent representations made as aforesaid by the persons aforesaid, made and issued the following certificate:

EXECUTIVE OFFICE,

SALEM, OREGON, June 23, 1869.

I, George L. Woods, Governor of the State of Oregon, do hereby certify that this plat or map of The Dalles Military Road has been duly filed in my office by the Dalles Military Road Company, and shows, in connection with the public surveys, as far as said public surveys are completed; the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an Act of Congress approved February 25, 1867, entitled "An Act granting lands to the State of Oregon to aid in the con-

struction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on Snake River," and with the Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, entitled "An Act donating certain lands to Dalles Military Road Company." I further certify that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by the said above-recited acts, and that the said road is accepted.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon.

Done at Salem, Oregon, June 23, 1869.

GEO. L. WOODS.

Attest. SAMUEL E. MAY,

(SEAL) *Secretary of State.*

VI. And your orator further shows to your Honors that it was not and is not true that the Dalles Military Road Company had at any time whatsoever constructed, or caused to be constructed, a road upon any line of route located or surveyed by said company, or by any other corporation, person or persons, anywhere within the limits of the grant of land provided for in the Act of Congress aforesaid, or at all, and this the said George L. Woods, Governor aforesaid, then and there well knew, and that it was not and is not true that the said Governor made a careful, or any, examination of any road constructed or owned by the Dalles Military Road Company.

VII. And your orator further shows to your Honors that said certificate was procured by the said Dalles Military Road Company by and through the false and fraudulent representations aforesaid by the officers, stockholders, agents and persons aforesaid in order to enable it falsely and fraudulently to obtain possession and control of the lands lying within the limits of the grant of land provided for in the Act of Congress aforesaid, and that the acceptance of said pretended road by the Governor aforesaid was a fraud upon the United States of America.

VIII. And your orator further shows to your Honors that said road never was built, graded, bridged, cleared or constructed, either in whole or in part, so as to be a public high-

way, or so as to permit of the transportation of any property, troops or mails of the United States over the same, and was not and never has been maintained as a public highway by either or any of the defendants herein, or any person or persons claiming any interest in the lands embraced within the limits provided for by said Act of Congress.

IX. And your orator further shows to your Honors that notwithstanding the provisions of the Act of Congress declaring that the lands granted thereby should be exclusively applied to the construction of the road, and to no other purpose, neither the said lands, nor the proceeds thereof, have ever been exclusively, or at all, applied to the construction of the road, or any part thereof, or to the construction of any bridges thereon, or the establishment of any ferries on any streams along the line of the road, or any part thereof.

X. And your orator further shows to your Honors that the lands granted by the said Act of Congress were not, and have not been, disposed of by the State of Oregon, or by the Legislative Assembly thereof, for the purposes expressed in the said act of Congress, or any thereof.

XI. And your orator further shows to your Honors that on the eighteenth day of June, A. D. 1874, the Congress of the the United States passed, and the President duly approved, an act which, after reciting that certain lands had theretofore by Acts of Congress been granted to the State of Oregon to aid in the construction of certain military wagon roads in said State, and that there was no existing law providing for the issuing of formal patents for said lands, provided as follows:

"That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon the payment of the necessary expenses thereof: *provided*, that this shall not be construed to revive any land grant already expired, not to cre-

ate any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled."

XII. And your orator further shows to your Honors that on the 19th day of June, A. D. 1876, the President of the United States, being deceived, misled and imposed upon by the false and fraudulent certificates hereinabove set forth, issued to the defendant, The Dalles Military Road Company, a patent for 126,910 23-100 acres of land included in the grants made or intended to be made by the said Acts of Congress, a copy of which patent is hereto annexed, marked Exhibit "A," and made part of this bill of complaint.

XIII. And your orator further shows to your Honors that on the 31st day of May, A. D. 1876, The Dalles Military Road Company, by its then President, P. J. Martin, and its then Secretary, C. N. Thornbury, pursuant to a resolution of the Board of Directors thereof, passed on the day last aforesaid, made, executed and delivered to Edward Martin a deed, a certified copy of which is hereunto attached, marked Exhibit "B," and made a part hereof; and that said deed was filed for record in the office of the County Clerk, Wasco County, Oregon, on the 31st day of May, A. D. 1876, and recorded in the Record of Deeds for Wasco County, Oregon, in Volume "E," on pages 435, 436, 437 and 438.

That on the 21st day of March, A. D. 1882, Eleanor Martin, as guardian of the person and estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minor heirs of Edward Martin, deceased, under an order and license of the County Court of Wasco County, Oregon, made, executed and delivered to Peter Donahue and James Phelan a deed, a certified copy of which is hereunto attached, marked Exhibit "C," and made a part hereof; and that said deed was filed for record in the office of the County Clerk of Wasco County, Oregon, on the 5th day of April, A. D. 1882, and was recorded in Record of Deeds for Wasco County, Oregon, in Volume "H," on pages 82, 83 and 84.

That on the 3d day of August, A. D. 1882, James Phelan and Alice, his wife, made, executed and delivered to Peter Donahue a deed, a certified copy of which is hereto attached, marked Exhibit "D," and made a part hereof; and that said deed was filed for record in the office of the County Clerk of Wasco

County, Oregon, on the 13th day of September, A. D. 1882, and recorded in Record of Deeds for Wasco County, Oregon, in Volume "H." on pages 275, 276 and 277.

That on the 4th day of August, A. D. 1884, Peter Donahue and Annie, his wife, D. V. H. Henaire and Mary, his wife, Eleanor Martin, T. J. Martin and Margaret A., his wife, James V. Martin, Thomas V. Martin and Ada B., his wife, Edward Martin, Barton L. Walker and Genevieve E., his wife, made, executed and delivered to the Eastern Oregon Land Company, a private incorporation, a deed, a certified copy of which is hereunto attached, marked Exhibit "E," and made a part hereof; and that said deed was filed for record in the office of the County Clerk of Wasco County, Oregon, on the 15th day of October, A. D. 1884, at 10:30 o'clock A. M., and was recorded in the Record of Deeds of Wasco County, Oregon, in Volume "J," on pages 119, 120, 121, 122, 123 and 124.

That each and every of said deeds conveyed the lands in bulk, and purported to grant to the respective grantees all the lands lying and being in the State of Oregon granted or intended to be granted to the State of Oregon by the Act of Congress first hereinabove pleaded and granted or intended to be granted by the State of Oregon to The Dalles Military Road Company by the Act of the Legislative Assembly first hereinbefore pleaded, and that the substantive parts of both of said acts are recited in all the said deeds and expressly made parts of each thereof.

XIV. And your orator further shows to your Honors, that the Eastern Oregon Land Company is a private corporation, purporting to have been incorporated under the laws of the State of California, on the 26th day of September, A. D. 1884. That the enterprise and business in which said corporation proposed to engage was, among other things, that of buying and selling lands in the State of Oregon. That the incorporators were P. J. Martin, Eleanor Martin, D. V. B. Henaire, P. Donahue, Edward Martin, Thomas S. Martin, J. V. Martin, Genevieve E. Walker and Jos. W. Winans. The said corporation is still in being, and that D. V. B. Henarie is the President, and T. B. Beach the Secretary thereof.

XV. And your orator further shows to your Honors, that the maps or plats referred to in the certificate hereinabove set

forth showed the line of the pretended road to be three hundred and fifty-seven miles, which would make the grant of lands covered by the Act of Congress first aforesaid embrace in the aggregate six hundred and eighty-five thousand four hundred and forty acres, of which five hundred and fifty-eight thousand five hundred and twenty-nine and 77-160 acres are not yet patented to said road company aforesaid, and the said road company inequitably claims the right to have a patent issued therefor.

XVI. And your orators further shows to your Honors, that each and every of the defendants, to-wit: The Dalles Military Road Company, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, The Eastern Oregon Land Company, and also James Phelan and Alice Phelan and Peter Donahue and Annie Donahue at the time of the execution and delivery of the deeds aforesaid, had full knowledge that the road provided for by the said Act of Congress first aforesaid had not at any time been constructed and maintained as required by the said Act of Congress and by the laws of the State of Oregon, so as to be in any sense whatsoever a public highway or so that it could be used by the United States or by any of the citizens or residents thereof as a public highway, oa so that the United States could transport its property, troops or mails over the same; and also had full knowledge that no grades had been established or constructed upon said road or any part thereof; that no ferries had been established or maintained; that no clearing done or any part thereof; no bridges built over any streams on the line thereof, and no cuts made and no turnouts constructed anywhere on said line of road by The Dalles Military Road Company or any of the grantors or grantees mentioned and described in any of the said deeds aforesaid; and that no bridges had been buil or maintained over any streams on the line of said road; and had full knowledge that said road was not begun nor completed within five years from the date of the passage of the Act of Congress first aforesaid, and that it had never been begun, constructed or maintained, and that each and every of said defendants well knew that the

statements made in the certificate of the Governor of Oregon hereinabove set forth were false; that the Governor did not at any time whatsoever examine the road referred to in his said certificate, and that said certificate had been procured by false and fraudulent representations as aforesaid, and that the patent aforesaid was found to be issued upon said false and fraudulently procured certificate.

## PRAYER.

I. Your orator therefore prays that all the lands granted to the State of Oregon by the Act of Congress of date February 25, A. D. 1867, be decreed forfeit to the United States and restored to the public domain.

II. That the patents described in this Bill of Complaint be declared fraudulent and void.

III. That the certificates described in this Bill of Complaint be declared fraudulent and void.

IV. That the deeds described in this Bill of Complaint be declared fraudulent and void.

V. That the United States have such other and further relief as to equity seemeth meet.

VI. That the United States Writ of Subpœna may issue requiring the defendants to appear in this Honorable Court under certain pains and penalties therein prescribed and answer the foregoing Bill of Complaint.

VI. And that the defendants pay the costs, expenses and disbursements of this suit.

(Signed) O. W. CHAPMAN,
Acting Attorney-General.
LEWIS L. MCARTHUR,
U. S. Attorney for Oregon.
WILLIAM CAREY JOHNSON,
Special Assistant U. S. Attorney.

[Endorsed] Filed August 29, 1889.
R. H. LAMSON, Clerk.

S. S. M. W. O. D.

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., Aug. —, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the patent issued to The Dalles Military Wagon Road Company, June 19th, 1876, for lands in the State of Oregon, is a true and literal exemplification from the record thereof in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(SEAL.) W. M. STONE,
Acting Commissioner of the General Land Office.

A. W. C. J. M. W. Ex.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

No. 1.

Whereas, by the act of Congress approved February 26, 1867, entitled, "An act granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from Dalles City, on the Columbia River, to Fort Boise on the Snake River," and for this purpose there is hereby granted alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of said road. Provided, that the lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose.

And whereas, by the 4th section of said act it is further enacted, that the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands not previously reserved to the United States, nor otherwise disposed of, and not exceeding ten miles in distance from its equal to the amount reserved from the operation of this act in the first section, to be selected in alternate sections:

And whereas, it is shown by certificate on file, of the Governor of said State, bearing date of June 23, 1869, that said Dalles Military Road had been completed in conformity with the requirements of said act:

And whereas, in accordance with the act of Congress approved June 18, 1874, the title to the lands thus granted by said act of February 25, 1867, is conveyed by the issuing of patent to the said State of Oregon for the use and benefit of said Military Road Company:

And whereas, certain tracts have been selected under the act aforesaid by Orlando Humason and Z. F. Moody, the land agents of said Dalles Military Wagon Road Company, as shown by their original list of selections dated November 14, 1870, and May 3, 1871, and certified under dates of November, 1870, and January 9, 1872, by the Registrars and Receivers at Le Grande and Oregon City, Oregon, the said tracts being described as follows, to wit:

SOUTH OF BASE LINE AND EAST OF WILLAMETTE MERIDIAN, LE GRANDE DISTRICT.

*Township thirteen, range twenty-nine.*

South half of the southeast quarter and the south half of southwest quarter of section three, containing one hundred and sixty acres; all of section five, containing six hundred and forty-one acres and ninety-one hundredths of an acre; all of section seven, containing six hundred and forty-four acres and fifty-four hundredths of an acre; all of section nine containing, six hundred and forty acres; south half of northeast quarter south half of northwest quarter and south half of section eleven, containing four hundred and eighty acres; all of section thirteen, containing six hundred and forty acres; all of section fifteen, containing six hundred and forty acres; all of section seventeen containing six hundred and forty acres; all of section nineteen, containing six hundred and forty-one acres and eighty hundredths of an acre; north half and southwest quarter of section twenty-one, containing four hundred and eighty acres; all of section twenty-three, containing six hundred and forty acres; all of section twenty-five, containing six hundred and forty acres; all of section twenty-seven, containing six hundred and forty acres; all of section twenty-nine, containing six hundred and forty acres; all of section thirty-one, containing six hundred and fifty-four acres and fifty-six hundredths of an acre; all of section thirty-three, containing six hundred and

forty acres: all of section thirty-five, containing six hundred and forty acres.

*Township thirteen, range thirty.*

South half of southeast quarter and south half of the southwest quarter of section five, containing one hundred and sixty acres; all of section seven, containing six hundred and forty-four acres and forty-four hundredths of an acre; all of section nine, containing six hundred and forty acres; south half northeast quarter, south half northwest quarter and south half of section eleven, containing four hundred and eighty acres; all of section thirteen, containing six hundred and forty acres; all of section fifteen, containing six hundred and forty acres; all of section seventeen, containing six hundred and forty acres; north half southwest quarter and north half southeast quarter of section nineteen, containing five hundred and sixty acres; all of section twenty-one, containing six hundred and forty acres; all of section twenty-three, containing six hundred and forty acres; southwest quarter of northeast quarter, southwest quarter of northwest quarter and south half of section twenty-five, containing four hundred acres; southeast quarter of northeast quarter, northeast of northwest quarter and south half of section twenty-seven, containing four hundred acres; northeast quarter, east half of northwest quarter, southwest quarter of northwest quarter and south half of section twenty-nine, containing six hundred acres; all of section thirty-one, containing six hundred and fifty acres and forty-three hundredths of an acre; all of section thirty-three, containing six hundred and forty acres; all of section thirty-five, containing six hundred and forty acres.

*Township thirteen, range thirty-one.*

South half of southeast quarter, south half of southwest quarter of section three, containing one hundred and sixty acres; southeast quarter southeast quarter of southwest quarter and north half of section seven, containing five hundred and twenty-one acres and eight hundredths of an acre; all of section nine, containing six hundred and forty acres; all of section eleven, containing six hundred and forty acres; all of section thirteen, containing six hundred and forty acres; all of section fifteen, containing six hundred and forty acres; all of

section seventeen, containing six hundred and forty acres; north half of southeast quarter north half of southwest quarter, southwest quarter of southwest quarter and north half of section nineteen, containing five hundred and twenty-one acres and twenty-eight hundredths of an acre; north half and southeast quarter of section twenty-one, containing four hundred and eighty acres; west half of southwest quarter, southeast quarter of southwest quarter and north half of section twenty-three, containing four hundred and forty acres; south half of northeast quarter, south half of northwest quarter, northeast quarter of northeast quarter and south half of section twenty-five, containing five hundred and twenty acres; all of section twenty-seven, containing six hundred and forty acres; all of section twenty-nine, containing six hundred and forty acres; all of section thirty-one, containing six hundred and forty-one acres and eighty-six hundredths of an acre; all of section thirty-three, containing six hundred and forty acres; all of section thirty-five, containing six hundred and forty acres.

*Township twelve, range thirty-two.*

Southeast quarter and south half of southwest quarter of section thirty-five containing two hundred and forty acres.

*Township thirteen, range thirty-two.*

All of section one, containing six hundred and forty acres; all of section three, containing six hundred and forty acres and ninety-six hundreths of an acre; south half of southeast quarter of section five, containing eighty acres; south half of northeast quarter, south half of northwest quarter and south half of section seven, containing four hundred and eighty one acres and twenty-two hundreths of an acre; all of section nine, containing six hundred and forty acres; all of section eleven, containing six hundred and forty acres; north half of northeast quarter, southeast quarter, north half of northwest quarter, southwest quarter of northwest quarter, west half of southwest quarter and southeast quarter southwest quarter of section thirteen, containing four hundred and eighty acres; southwest quarter, north half of southeast quarter, southeast quarter of southeast quarter and north half of section fifteen, containing six hundred acres; all of section seventeen, con-

taining six hundred and forty acres; all of section nineteen, containing six hundred and forty acres; north half and southwest quarter of section twenty-one, containing four hundred and eighty acres; all of section twenty-three, containing six hundred and forty acres; all of section twenty-five, containing six hundred and forty acres; all of section twenty-seven, containing six hundred and forty acres; all of section twenty-nine, containing six hundred and forty acres; all of section thirty-five, containing six hundred and forty acres.

*Township twelve, range thirty-three.*

South half of section twenty-five, containing three hundred and twenty acres; south half of section thirty-one, containing three hundred and nineteen acres and eighty-one hundredths of an acre; south half of northeast quarter, south half of northwest quarter and south half of section thirty-three, containing four hundred and eighty acres.

*Township thirteen, range thirty-three.*

Southeast quarter, north half southwest quarter and north half of section one, containing four hundred and fifty-nine acres and forty six hundredths of an acre; all of section three, containing six hundred and thirty-nine acres and ninety-four hundredths of an acre; all of section five, containing six hundred and forty-two acres and ninety-six hundredths of an acre; all of section seven, containing six hundred and forty-two acres and seventy-eight hundredths of an acre; north half southeast quarter, southeast quarter of southeast quarter, northwest quarter of southwest quarter, and north half of section nine, containing four hundred and eighty acres; east half northwest quarter, south half of northeast quarter, northeast quarter of northeast quarter, southwest quarter of southeast quarter, and southwest quarter of section eleven, containing four hundred acres; east half of northwest quarter and east half of section thirteen, containing four hundred acres; all of section fifteen, containing six hundred and forty acres; northeast quarter and south half of section seventeen, containing four hundred and eighty acres; all of section nineteen, containing six hundred and forty-nine acres and thirty hundredths of an acre; all of section twenty-one, containing six hundred and forty acres; all of section twenty-three, containing six hundred and forty

acres; all of section twenty-five, containing six hundred and forty acres; all of section twenty-seven, containing six hundred and forty acres; all of section twenty-nine, containing six hundred and forty acres; north half southeast quarter, north half southwest quarter and north half of section thirty-one containing four hundred and ninety-six acres and forty-one, hundredths of an acre; north half of section thirty-three, containing three hundred and twenty acres.

*Township twelve, range thirty-four.*

All of section thirty-one, containing six hundred and forty-one acres and twenty-two hundredths of an acre; south half of southeast quarter and south half of southwest quarter of section thirty-three, containing one hundred and sixty acres.

*Township thirteen, range thirty-four.*

South half of section three, containing three hundred and twenty acres; all of section five, containing six hundred and forty-three acres and sixteen hundredths of an acre; southwest quarter of the northeast quarter of section seven, containing three hundred and twenty-two acres and seventy-five hundredths of an acre; all of section nine, containing six hundred and forty acres; all of section eleven, containing six hundred and forty acres; all section thirteen, containing six hundred and forty acres; all of section fifteen, containing six hundred and forty acres; west half of southwest quarter, southeast of southwest quarter and southeast quarter of southeast quarter of section seventeen, containing one hundred and sixty acres; all of section nineteen, containing six hundred and forty acres and four hundredths of an acre; south half of northwest quarter, northwest quarter of northwest quarter, northeast quarter of northeast quarter, west half of southeast quarter, southeast quarter of southeast quarter and southwest quarter of section twenty-one, containing four hundred and forty acres; all of section twenty-three, containing six hundred and forty acres; all of section twenty-five, containing six hundred and forty acres; all of section twenty-seven, containing six hundred and forty acres; all of section twenty-nine, containing six hundred and forty acres; north half and southeast quarter of section thirty-one, containing four hundred and eighty-five acres; all of section thirty-three, containing six hundred and forty acres;

north half and southwest quarter of section thirty-five, containing four hundred and eighty acres.

*Township thirteen, range thirty.*

East half of northeast quarter and northwest quarter of the northeast quarter of section twenty-five, containing one hundred and twenty acres.

NORTH OF BASE LINE AND EAST OF WILLAMETE MERIDIAN, OREGON CITY DISTRICT.

*Township one, range thirteen.*

West half of northwest quarter, southeast quarter of northwest quarter, west half of southwest quarter, east half of of southeast quarter and northeast quarter of section thirteen, containing four hundred and forty acres: east half of northwest quarter of section fifteen, containing eighty acres.

*Township one, range fourteen.*

All of section one, containing six hundred and forty-eight acres and sixteen hundredths of an acre: all of section three containing six hundred and fifty-three acres and fifty-four hundredths of an acre: south half of section five, containing three hundred and twerty acres: east half of northwest quarter, east half of southwest quarter, west half of northwest quarter, and east half of section seven, containing five hundred and eighty-six acres and forty hundredths of an acre; southwest quarter of section nine, containing one hundred and sixty acres; all of section eleven, containing six hundred and forty acres; all of section thirteen, containing six hundred and forty acres; east half of section fifteen, containing three hundred and twenty acres: north half of southwest quarter, northwest quarter and east half of section seventeen, containing five hundred and sixty acres: north half of section twenty-one, containing three hundred and twenty acres: north half of southeast quarter, north half of southwest quarter and north half of section twenty-three, containing four hundred and eighty acres.

*Township two, range fourteen.*

South half of section twenty-one, containing three hundred and twenty acres; south half of southeast quarter, south half of

south west quarter of section twenty-three, containing one hundred and sixty acres: north half of section twenty-five, containing three hundred and twenty acres: north half of northeast quarter, and south half of section twenty-seven, containing four hundred acres: southeast quarter of northwest quarter, southwest quarter and east half of section twenty-nine, containing five hundred and twenty acres: east half of northeast quarter and southwest quarter of northeast quarter of section thirty-one, containing one hundred and twenty acres: north half of southeast quarter, north half of southwest quarter and north half of section thirty-three, containing four hundred and eighty acres: all of section thirty-five, containing six hundred and forty acres.

*Township one, range fifteen.*

Northwest quarter, east half of southwest quarter and east half of section one, containing five hundred and fifty-eight acres and ninety-six hundredths of an acre: all of section three, containing six hundred and thirty-eight acres and ninety-six hundredths of an acre: all of section five, containing six hundred and forty acres and eighty-seven hundredths of an acre; all of section seven, containing six hundred and ninety-three acres and five hundredths of an acre: northeast quarter of northeast quarter, south half of northeast quarter, south half of northwest quarter, and south half of section nine, containing five hundred and twenty acres: west half of northeast quarter, northeast quarter of northeast quarter, lots numbered one, two, three and four, and west half of section eleven, containing six hundred and six acres and fifty-one hundredths of an acre: all of section thirteen, containing six hundred and forty acres: all of section fifteen, containing six hundred and forty acres: all of section seventeen, containing six hundred and forty acres: north half of southeast quarter, southwest quarter of southeast quarter, southwest quarter and north half of section nineteen, containing six hundred and fifty-one acres and twelve hundredths of an acre: all of section twenty-one, containing six hundred and forty acres: east half of northeast quarter, west half of northwest quarter, lots numbered one, two, three, four, five, six, seven and eight, and southwest quarter of section twenty-three, containing five hundred

and ninety-three acres and seventy hundredths of an acre: east half of northeast quarter, northwest quarter of northeast quarter, north half of northwest quarter, northwest quarter of southwest quarter, and lots numbered one, two, three, four, five, six, seven and eight of section twenty-five, containing four hundred and ninety-two acres and sixty-two hundredths of an acre: north half of section twenty-seven, containing three hundred and twenty acres: east half of northwest quarter, southwest quarter of northwest quarter and northeast quarter of section twenty-nine, containing two hundred and eighty acres.

*Township two, range fifteen.*

South half of northeast quarter, south half of northwest quarter and south half of section twenty-five containing four hundred and eighty acres; south half of northeast quarter, south half of northwest quarter and south half of section twenty-seven, containing four hundred and eighty acres; south half of northeast quarter, south half of northwest quarter and south half of section twenty-nine, containing four hundred and eighty acres; east half of southwest quarter, west half of fractional northwest quarter, west half of fractional southwest quarter, and southeast quarter of section thirty-one, containing four hundred and fifty-six acres and ninety-eight hundredths of an acre; east half of southwest quarter, northwest quarter of southwest quarter, northwest quarter and east half of section thirty three, containing six hundred acres; northeast quarter of northwest quarter, west half of northwest quarter, southeast quarter of northeast quarter, east half of southeast quarter, southwest quarter of southeast quarter, northwest quarter of southwest quarter, and lots numbered one, two, three, four, five, six, seven, eight, nine and ten of section thirty-five, containing four hundred and seventy-three acres and thirty-eight hundredths of an acre.

*Township one, range sixteen.*

All of section three, containing six hundred and thirty-seven acres and sixty hundredths of an acre: all of section five, containing six hundred and thirty-seven acres and sixty-four hundredths of an acre; all of section seven, containing six hundred and ninety-two acres and eighteen hundredths of an acre; all of section nine, containing six hundred and forty acres; all

of section eleven, containing six hundred and forty acres; all of section thirteen, containing six hundred and forty acres; all of section fifteen, containing six hundred and forty acres; all of section seventeen, containing six hundred and forty acres; all of section nineteen, containing six hundred and ninety-three acres and ninety-four hundredths of an acre; all of section twenty-one, containing six hundred and forty acres; all of section twenty-three, containing six hundred and forty acres; all of section twenty-five, containing six hundred and forty acres; all of section twenty-seven, containing six hundred and forty acres; all of section twenty-nine, containing six hundred and forty acres; northeast quarter of northeast quarter, and lots numbered one, two, and three of section thirty-one, containing one hundred and eighty-six acres and forty hundredths of an acre; all of section thirty-three, containing six hundred and forty acres; all of section thirty-five, containing six hundred and forty acres.

*Township two, range sixteen.*

All of section thirty-one, containing six hundred and ninety-three acres and forty-six hundredths of an acre; south half of section thirty-three, containing three hundred and twenty acres.

*Township one, range seventeen.*

Southwest quarter of section seventeen, containing one hundred and sixty acres; all of section nineteen, containing six hundred and eighty-seven acres and thirty hundredths of an acre; all of section twenty-nine, containing six hundred and forty acres; all of section thirty-one, containing six hundred and eighty acres and sixty-four hundredths of an acre; all of section thirty-three, containing six hundred and forty acres, south of base line and east of Willamette meridian.

*Township one, range seventeen.*

All of section five, containing six hundred and fifty-four acres and forty-six hundredths of an acre; all of section seven, containing six hundred and five acres and seventy-six hundredths of an acre; all of section seventeen, containing six hundred and forty acres; all of section nine, containing six hundred and forty acres; all of section nineteen, containing six hundred and ninety-seven acres and fifty-four hundredths

of an acre; west half of northeast quarter, west half of southeast quarter and west half of section twenty-one, containing four hundred and eighty acres; all of section twenty-nine, containing six hundred and forty acres; all of section thirty-one, containing five hundred and ninety-seven acres and twenty-two hundredths of an acre; west half of northeast quarter, west half of southeast quarter and west half of section thirty-three, containing four hundred and eighty acres.

*Township two, range seventeen.*

All of section five, containing six hundred and fifty acres and seventy-eight hundredths of an acre; all of section seven, containing six hundred and five acres and sixty hundredths of an acre; west half of section nine, containing three hundred and twenty acres; east half of northeast quarter, east half of southeast quarter and west half of section seventeen, containing six hundred acres and eighty hundredths of an acre; west half of section twenty-one, containing three hundred and twenty acres; all of section twenty-nine, containing six hundred and forty acres; all of section thirty-one, containing five hundred and ninety-seven acres and eighty hundredths of an acre; all of section thirty-three, containing six hundred and forty acres.

*Township six, range seventeen.*

All of section one, containing six hundred and forty-two acres and eighty-two hundredths of an acre; all of section three, containing six hundred and fifty-five acres and fifty-four hundredths of an acre; all of section five, containing six hundred and sixty-six acres and twenty-four hundredths of an acre; east half of northeast quarter, south half of southwest quarter and southeast quarter of section seven, containing three hundred and twelve acres and fifty hundredths of an acre; all of section nine, containing six hundred and forty acres; all of section eleven, containing six hundred and forty acres; north half of section thirteen, containing three hundred and twenty acres; all of section fifteen, containing six hundred and forty acres; all of section seventeen, containing six hundred and forty acres; all of section nineteen, containing six hundred and fourteen acres and twenty hundredths of an acre; all of section twenty-one, containing six hundred and forty acres; all of section thirty-one, containing six hundred and fourteen

acres and thirty-eight hundredths of an acre: all of section thirty-three, containing six hundred and forty acres.

*Township seven, range seventeen.*

All of section three, containing six hundred and thirty-eight acres and thirty hundredths of an acre: all of section five, containing six hundred and thirty-nine acres and eight hundredths of an acre: all of section seven, containing six hundred and eleven acres and forty hundredths of an acre: all of section nine, containing six hundred and forty acres: all of section fifteen, containing six hundred and forty acres: all of section seventeen, containing six hundred and forty acres: all of section nineteen, containing six hundred and forty acres: all of section twenty-one, containing six hundred and forty acres: all of section twenty-three, containing six hundred and forty acres: all of section twenty-five, containing six hundred and forty acres: all of section twenty-seven, containing six hundred and forty acres: all of section twenty-nine, containing six hundred and forty acres: all of section thirty-one, containing six hundred and thirteen acres and eighty hundredths of an acre: all of section thirty-three, containing six hundred and forty acres: all of section thirty-five, containing six hundred and forty acres.

*Township eight, range seventeen.*

All of section one, containing six hundred and thirty-nine acres and twenty-two hundredths of an acre: all of section three, containing six hundred and forty-one acres and ninety-eight hundredths of an acre: all of section five, containing six hundred and forty acres and ninety-eight hundredths of an acre: northeast quarter of section seven, containing one hundred and sixty acres: all of section nine, containing six hundred and forty acres: all of section eleven, containing six hundred and forty acres: all of section thirteen, containing six hundred and forty acres: all of section fifteen, containing six hundred and forty acres: east half of southwest quarter, northwest quarter and east half of section twenty-three, containing five hundred and sixty acres: east half and northwest quarter of section twenty-five, containing four hundred and eighty acres.

The said tracts as described in the foregoing pages numbered

two to thirteen, inclusive, contain the aggregate area of one hundred and twenty-six thousand nine hundred and ten acres and twenty-three hundredths of an acre (126,910 23-100).

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant unto the said State of Oregon, for the use and benefit of The Dalles Military Wagon Road Company, of said State, and its assigns, the tracts of land selected as aforesaid and described in the foregoing, to have and to hold the said tracts, with the appurtenances thereof, unto the said State, for the use and benefit of the said Dalles Military Wagon Road Company and its assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this nineteenth day of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the independence of the United States the one hundredth.

U. S. GRANT.

By the President:

By D. D. CONE,
Secretary.

(SEAL.)

S. W. CLARK,
Recorder of the General Land Office.

EXHIBIT B.

*Certified copy of deed. Dalles Military Road Company to Edward Martin. Dated May 31, 1876.*

[Filed for record on the 31st day of May, A. D. 1876.]

This indenture, made and entered into this 31st day of May, A. D. 1876, between the Dalles Military Road Company, a corporation duly incorporated, organized and existing under the laws of the State of Oregon, having its principal office and place of business at Dalles City, Wasco County, State of Oregon, the party of the first part, and Edward Martin, of the city and county of San Francisco, State of California, the party of the second part, witnesseth: That said party of the first part, The Dalles Military Road Company, a corporation as afore-

said, for the sum of $125,000 to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, released and conveyed and by these presents it does grant, bargain, sell, release and convey, unto the said party of the second part, his heirs and assigns, all the lands lying and being in the State of Oregon, granted or intended to be granted to said State by act of Congress, approved February 25th, A. D. 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River," and the right to a patent or patents for said lands granted to said party of the first part by act of Congress, approved June 18, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which said lands were granted or intended to be granted by the State of Oregon to the said Dalles Military Road Company by an act of the legislative assembly of said State of Oregon, approved October 20, 1868, entitled "An act donating certain lands to The Dalles Military Road Company," which said several acts are hereby made part hereof, and all the right, title, and interest acquired or to be acquired by the party of the first part under the said several acts, hereinbefore referred to, or either of them, and also all future right, title interest, claim, property, and demand which the party of the first part may at any time hereafter acquire to said lands or any part thereof, or to any lands or to any patents or patent therefor by virtue of said acts of Congress or either of them, and said act of the legislative assembly of the State of Oregon, whether said lands are surveyed or unsurveyed, by virtue of any further compliance or any preceding compliance with the requirements of said acts or otherwise, subject to the payment by said party of the second part of whatever may be due the United States for entering and patenting said lands. It being the intention of the party of the first part to convey, and it does hereby convey to the party of the second part the said lands, and all of the right, title, and interest acquired by said party of the first part under said acts or either of them in said lands or any part thereof or any lands, being all the interest in and to the lands and premises hereinbefore described, together with any and all further interest that

it may hereafter acquire or now possess by virtue of any further compliance with all or any of said several acts referred to; reserving an excepting from this conveyance, however, all sales of land heretofore made by the party of the first part.

The said party of the first part hereby covenants and agrees with the party of the second part that it will at any time when desired by said party of the second part to him, his heirs and assigns any further conveyance and assurance of title to the lands aforesaid and every part thereof, and said party of the first part covenants and agrees with said party of the second part to keep up its corporate organization and to do every act and thing necessary and requisite to perfect the title to all the lands included in the grant aforesaid.

To have and to hold the lands hereby granted and every part and parcel thereof unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has caused its corporate seal to be affixed to these presents and the same to be signed by its president and secretary, by resolution of the board of directors thereof, duly passed to that effect, at Dalles City, Wasco County, State of Oregon, this 31st day of May, A. D. 1876.

P. J. MARTIN,
President D. M. R. Co.

C. N. THORNBURY,
Secretary D. M. R. Co.

And witness the seal thereof—
(SEAL.)

Signed, sealed, and delivered in the presence of—

BEN. KORTON.
J. B. CONDON.

STATE OF OREGON, }
County of Wasco. }

On the 31st day of May, A. D. 1876, before the undersigned, a notary public in and for Wasco County, State of Oregon, came the above-named P. J. Martin, president of The Dalles Military Road Company, and C. N. Thornbury, secretary of said company, both of whom are well known to me to be the persons described in and who executed the foregoing convey-

ance, and the said P. J. Martin acknowledged to me that he had executed the said conveyance as president of said Dalles Military Road Company, for the objects and purposes therein stated, in compliance with a resolution passed by the board of directors of said company on the 30th day of May, A. D. 1876, and the said C. N. Thornbury acknowledged to me that he had executed said conveyance for the purposes therein set forth, and in attestation thereto affixed to said conveyance the corporate seal of the said Dalles Military Road Company as secretary thereof, in compliance with a resolution of the board of directors of said company.

In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written in this certificate.

(SEAL.) JAMES B. CONDON,
Notary Public, Oregon.

STATE OF OREGON, }
County of Wasco. } ss.

I, George H. Thompson, county clerk in and for Wasco County, and ex-officio clerk of the county court of the State of Oregon, for the county of Wasco, do hereby certify that I have compared the foregoing with the original deed from The Dalles Military Road Company to Edward Ma tin, bearing date May 31, 1876, as the same now appears of record at pages 435, 436, 437, and 438, Volume E, Record of Deeds for Wasco County, Oregon, now in my office and custody. And that it is a true and correct transcript therefrom and of the whole of said original deed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 2nd day of September, 1887.

(SEAL.) GEO. H. THOMPSON, Clerk.
By J. M. HUNTINGTON, Deputy Clerk.

EXHIBIT C.

*Certified copy of deed, Eleanor Martin, guardian, etc., to Peter Donahue and James Phelan, dated March 21, 1882.*

[Filed for record on April 5, 1882.]

This indenture, made the twenty-first day of March, A. D. 1882, by and between Eleanor Martin, the duly appointed and

qualified guardian of the persons and estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, party of the first part, and Peter Donahue and James Phelan, of the city of San Francisco, State of California, parties of the second part, witnesseth:

That, whereas, on the 3rd day of January, A. D. 1882, the county court of Wasco County, in the State of Oregon, made an order and license of sale authorizing the said party of the first part to sell certain real estate of the said minors, situate in the counties of Wasco, Grant, and Baker, in the State of Oregon, and particularly described in the said order and license of sale, and which said order and license of sale, now on file and of record in the said county court, Wasco County, are hereby referred to and made a part of this indenture: and

Whereas, under and by virtue of the said order and license of sale, and pursuant to legal notices given thereof, the said party of the first part on the 6th day of February, A. D. 1882, at 12 o,clock noon, at the Courthouse door, at The Dalles, in the County of Wasco, State of Oregon, offered for sale at public auction, and subject to confirmation by the said County Court of Wasco County, the portion of the said real estate situated in the said County of Waco, and specified and described in said order and license of sale, as aforesaid: and at such sale the said parties of the second part became the purchasers of the whole of the said real estate hereinafter particularly described, situated in Wasco County aforesaid, for the sum of $57,500, they being the highest and best bidders, and that being the highest and best sum bid for the same: and

Whereas, the said County Court of Wasco County, upon a due and legal return of her proceedings under the said order and license of sale made by the said party of the first part on the 24th day of February, 1882, did on the 6th day of March, A. D. 1882, make an order confirming the said sale, and directing conveyances to be made, executed and delivered to the said parties of the second part, and which order of confirmation now on file and of record in the said County Court of Wasco County is hereby referred to and made a part of this indenture:

Now, therefore, the said Eleanor Martin, the guardian of the persons and estates of the said minors, James V. Martin, Gene-

vieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, as aforesaid, the party of the first part, pursuant to the order last aforesaid of the said County Court of Wasco County, for and in consideration of the said sum of $57,500 to her in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns forever, all the right, title, interest and estate of the said James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, in and to all that part of the lands known as The Dalles military road lands, which are situate, lying and being in the County of Wasco, State of Oregon, the said Dalles military road lands being the alternate sections of the public lands of the United States as surveyed, or to be surveyed by the United States, designated by odd numbers, to the extent of three sections in width on each side of the military road constructed by The Dalles Military Road Company from Dalles City on the Columbia River to Fort Boise on the Snake River, and including such lieu lands as have been or may hereafter be selected and located, not exceeding ten miles in distance from said road, under and in pursuance of the act of Congress entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City on the Columbia River to Fort Boise on the Snake River," passed February 25, 1867, and any other acts of Congress and the acts of the Legislative Assembly of the State of Oregon relating or pertaining to the said Dalles military road lands, saving and excepting those portions of The Dalles military road lands which have been heretofore lawfully sold and conveyed by the said Dalles Military Road Company to other persons than Edward Martin and by said Edward Martin in his lifetime, the said lands so previously conveyed not being included in this sale and conveyance, which said lands are listed in part only and amount to 247,230 acres, more or less. The interest of said minors in and to the above mentioned and designated lands so sold is five-eighths of three-fourths thereof, subject to the right of dower therein and thereto held by and belonging to Eleanor Martin, the widow of Edward Martin, deceased.

Together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in anywise appertaining.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, their heirs and assigns, to their sole use, benefit and behoof forever.

In witness whereof, the said party of the first part, guardian as aforesaid, has hereto set her hand and seal the day and year first above written.

(SEAL) ELEANOR MARTIN,
Guardian of the persons and estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors.

Signed, sealed and delivered in the presence of—
T. P. BEACH.
SAM'L S. MURFEY.

STATE OF CALIFORNIA, )
City and County of San Francisco. ) ss.

On this 22d day of March, A. D. 1882, personally came before me, Samuel S. Murfey, a Commissioner of Deeds for the State of Oregon, residing in the City and County of San Francisco, State of California, Eleanor Martin, guardian of the persons and estate of James Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, to me personally known to be the identical person described in and who executed the foregoing deed, and who acknowledged to me that she executed the same as guardian aforesaid freely for the uses and purposes therein named.

In witness whereof, I have hereunto set my hand and affixed my official seal this 22d day of March, A. D. 1882.

(SEAL) SAM'L S. MURFEY,
Commissioner of Deeds for the State of Oregon.

STATE OF OREGON, )
County of Wasco, ) ss.

I, George H. Thompson, County Clerk in and for Wasco County and ex-officio clerk of the County Court of the State of Oregon for the County of Wasco, do hereby certify that I

have compared the foregoing with the original deed from Eleanor Martin, guardian, etc., to Peter Donahue and James Phelan, bearing date March 21, 1882, as the same now appears of record at pages 82, 83 and 84 Volume "H," Records of Deeds for Wasco County, Oregon, now in my office and custody, and that it is a true and correct transcript therefrom and of the whole of said original deed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 3d day of September, 1887.

GEORGE H. THOMPSON, Clerk.

(SEAL) By J. M. HUNTINGTON, Deputy Clerk.

EXHIBIT D.

*Certified copy of deed. James Phelan and wife to Peter Donahue. Dated August 3, 1882.*

[Filed for record on September 13, 1882.]

This indenture, made this 3d day of August, A. D. 1882, by and between James Phelan and Alice Phelan, his wife, both of the city and county of San Francisco, State of California, the parties of the first part, and Peter Donahue, of the same place, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of $71,625, lawful money of the United States, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey, unto the said party of the second part, all the right, title, and interest of the parties of the first part in and to the lands known as The Dalles Military road lands, which are situate, lying, and being in the counties of Wasco, Grant and Baker, State of Oregon; the said Dalles military road lands being the alternate sections of the public lands of the United States, as surveyed or to be surveyed by the United States, designated by odd numbers, to the extent of three sections in width on each side of the military road constructed by The Dalles Military Road Company, from Dalles City, on the Columbia River, to Fort Boise, on the Snake River, and including such lieu lands as have been, or may hereafter be, selected and located, not exceeding ten miles in distance from

said road, under and in pursuance of the act of Congress entitled, "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River," passed February 25, 1867, and any other acts of Congress, and the acts of the Legislative Assembly of the State of Oregon relating or pertaining to the said Dalles military road lands, saving and excepting those portions of the said Dalles military road lands which have been heretofore lawfully sold and conveyed by the said Dalles Military Road Company to other persons than Edward Martin and by said Edward Martin in his lifetime, the said lands so previously conveyed not being included in this sale and conveyance.

The lands hereby conveyed being all and singular the property and premises conveyed to the said James Phelan, one of the parties of the first part, by Eleanor Martin, guardian of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, minors, by three deeds, each bearing date the 21st day of March, A. D. 1882, and recorded respectively as follows:

In Wasco County, on the 5th day of April, 1882, in Volume H of Deeds, page 82.

In Grant County, on the 22d day of April, 1882, in Volume E of Deeds, pages 9 and 12.

In Baker County, on the 3d day of April, 1882, in Volume 9 of Deeds, page 150.

Together with the tenements, hereditaments, and appurtenances whatsoever to the same belonging or in any wise appertaining.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit, and behoof forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the days and year first above written.

JAMES PHELAN. (SEAL)

MRS. ALICE PHELAN. (SEAL)

Signed, sealed and delivered in the presence of:—

SAM'L S. MURFEY,
WM. B. LATHAM,

As to the signature of James Phelan.

EDWIN F. COREY,
JOHN B. SIMPSON,

As to Alice Phelan.

STATE OF CALIFORNIA, } ss.
City and County of San Francisco. }

On this 3rd day of August, A. D. 1882, personally came before me, Samuel S. Murfey, a commissioner of deeds for the State of Oregon, resident in the City and County of San Francisco, State of California, the within named James Phelan, to me personally known to be one of the identical persons described in and who executed the within instrument and acknowledged to me that he executed the same freely for the uses and purposes therein named.

Witness my hand and official seal as such commissioner this 3rd day of August, A. D. 1882.

(SEAL.) SAM'L S. MURFEY,
Commissioner of Deeds for the State of Oregon in the State of California.

STATE OF NEW YORK, } ss.
City and County of New York. }

Be it remembered, that on this 12th day of August, in the year 1882, before me, the undersigned, Edwin F. Corey, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Oregon to take acknowledgments of deeds, etc., to be used or recorded therein, personally appeared Alice Phelan, wife of James Phelan, to me personally known to be the identical person described in and who executed the within instrument, and acknowledged to me on an examination separate and apart from her husband that she executed the same freely and without fear or compulsion from any one, for the uses and purposes therein named.

Given under my hand and official seal the day and year last aforesaid.

(SEAL.) EDWIN F. COREY,
Commissioner for the State of Oregon,
Office 84 Wall Street, N. Y.

STATE OF OREGON,
County of Wasco, } ss.

I, George H. Thompson, county clerk in and for said Wasco County, and ex-officio clerk of the county court of the State of Oregon for the county of Wasco, do hereby certify that I have compared the foregoing with the original deed from James Phelan and wife to Peter Donahue, and bearing date August 3rd, 1882, as the same now appears of record at pages 275, 276, and 277 of Volume "H," Records of Deeds for Wasco County, Oregon, now in my office and custody. And that it is a true and correct transcript therefrom and of the whole of said original deed.

In witness whereof, I have hereunto set my hand and affixed the seal of court, this 3rd day of September, 1887.

GEORGE H. THOMPSON, Clerk.

(SEAL.) By J. M. HUNTINGTON, Deputy Clerk.

EXHIBIT E.

*Certified copy of deed, Peter Donahue, et als. to Eastern Oregon Land Company, dated August 11, 1884.*

[Filed October 15, 1884, at 10:30 A. M.]

This indenture, made and entered into this 11th day of August, A. D, 1884, by and between Peter Donahue and Annie Donahue, his wife, D. V. B. Henarie and Mary A. Henarie, his his wife, Eleanor Martin, T. J. Martin and Margaret A. Martin, his wife, of the City and County of San Francisco, State of California, and James V. Martin, of the City and County of Los Angeles, State aforesaid, and Thomas S. Martin and Ada B. Martin, his wife, and Edward Martin, of the City of Portland, State of Oregon, and Barton L. Walker and Genevieve E. Walker, his wife, of the City of Washington, District of Columbia, parties of the first part, and the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California, and having its office and

principal place of business in the City and County of San Francisco, the party of the second part, witnesseth:

Whereas, the said parties of the first part are the owners of, and have each an undivided interest in common in the lands hereinafter mentioned and described in the respective proportions following, to wit:

The said Peter Donahue, three-sixteenths; the said D. V. B. Henarie, four-sixteenths; the said Eleanor Martin, four-sixteenths; the said P. J. Martin, one-sixteenth; the said James V. Martin, one-sixteenth; the said Thomas S. Martin, one-sixteenth; the said Edward Martin, one-sixteenth; and the said Genevieve E. Walker, one-sixteenth. And whereas, the said parties of the first part have negotiated with the said party of the second part for the sale of the said lands upon the terms which have been mutually agreed upon by and between the several and respective parties hereto of the first and second parts.

Now, therefore, in consideration of the premises and of the sum of one dollar, lawful money of the United States of America, to each of them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto said party of the second part, its successors and assigns, all those certain lands situate, lying and being in the counties of Wasco, Grant and Baker, State of Oregon, granted to the State of Oregon by the act of Congress of the United States of America, entitled, "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River," approved February 25, A. D. 1867, and granted to the said Dalles Military Road Company by an act of the Legislative Assembly of the State of Oregon, entitled, "An act donating lands to The Dalles Military Road Company," approved October 20, 1868.

Being the lands conveyed to Edward Martin, now deceased, by the said The Dalles Military Road Company by its deed bearing date May 31, 1876, and duly recorded in the office of the County Clerk of the said County of Wasco, on the 31st day of May, A. D. 1876, in Volume E, page 435, and in the office of the County Clerk of the said County of Grant on the

3d day of June, A. D. 1876, in book C, page 195, and in the office of the County Clerk of the said County of Baker, on the 7th day of June, A. D. 1876, in book **D** of Deeds, page 200, and commonly known and designated as The Dalles military road lands, a portion of which lands are embraced in the County of Cook, recently formed, or about to be formed of and from a portion or portions of said Wasco and Grant Counties. Saving and excepting therefrom and from the operation of this conveyance certain portions and parcels of said Dalles military road lands heretofore sold and conveyed by the said Edward Martin, grantee thereof, as aforesaid, in his lifetime and by his successors in interest.

The several and respective interests of the several and respective parties of the first part by them respectively herein and hereby conveyed, being subject to the proper and respective proportions of the debts, charges, and expenses belonging thereto respectively.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the revision and revisions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the said premises, together with the appurtanances, unto the said parties of the second part, its successors and assigns forever.

In withess whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

P. DONAHUE. (SEAL.)
ANNIE DONAHUE. (SEAL.)
D. V. B. HENARIE. (SEAL.)
MARY A. HENARIE. (SEAL.)
ELEANOR MARTIN. (SEAL.)
P. J. MARTIN. (SEAL.)
MARGARET A. MARTIN. (SEAL.)
JAS. V. MARTIN. (SEAL.)
THOS. S. MARTIN. (SEAL.)
ADA B. MARTIN. (SEAL.)
EDWARD MARTIN. (SEAL.)
BARTON L. WALKER. (SEAL.)
GENEVIEVE E. WALKER. (SEAL.)

Signed, sealed and delivered in the presence of—
A. MAUDE HENARIE and
EUGENE W. LEVY,
As to the signature of Mary A. Henarie.
ANNIE MARTIN and
EUGENE W. LEVY,
As to the signature of Margaret A. Martin.
EUGENE W. LEVY and
CHARLES T. STANLEY,
As to the signatures of P. Donahue and Annie Donahue.
EUGENE W. LEVY and
T. P. BEACH,
As to the signature of D. V. B. Henarie.
EUGENE W. LEVY and
T. P. BEACH,
As to the signature of Eleanor Martin.
EUGENE W. LEVY and
T. P. BEACH,
As to the signatures of P. J. Martin and James V. Martin.
EUGENE W. LEVY and
CHARLES T. STANLEY,
As to the signature of Edward Martin.
EUGENE D. WHITE,
ARTHUR E. SLOAN,
Witnesses to signature of Thomas S. Martin.
EUGENE D. WHITE and
ARTHUR E. SLOAN,
Witnesses to signature of Ada B. Martin.

Witnesses to signatures of Barton L. Walker and Genevieve E. Walker, JOHN E. BEAL, ALBERT D. GILME.

STATE OF OREGON, } ss.
County of Multnomah. }

Be it remembered, that on this 18th day of August, 1884, before me, the undersigned, a Notary Public, in and for said county and State, personally appeared the within named Thomas S. Martin and Ada B. Martin, who are known to me to be the identical persons described in and who executed the

within instrument, and acknowledged to me that they executed the same: and Ada B. Martin, wife of the said Thomas S. Martin, on an examination made by me separate and apart from her husband, acknowledged to me that she executed the same freely and voluntarily, and without fear, coercion, or compulsion from any one.

In testimony whereof I have hereunto set my hand and notarial seal the day and year last above written.

EUGENE D. WHITE,
Notary Public of Oregon.

(SEAL.)

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

On the 11th day of August, A. D. 1884, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared James V. Martin and Edward Martin, to me personally known to be the identical persons whose names are subscribed to, who are described in, and who executed the annexed and within instrument, and they severally duly acknowledge to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL.)

EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

On the 11th day of August, A. D. 1884, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared Peter Donahue and Annie Donahue, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in, and who executed the annexed and within instrument, and they severally and duly

acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Annie Donahue, on examination, separate and apart from her husband, duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written,

(SEAL.) EUGENE W. LEVY,
Commissioner for the State of Oregon in California.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

On the 11th day of August, 1884, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned, and sworn, and residing in the city and county of San Francisco, State of California, personally appeared D. V. B. Henarie and Mary A. Henarie, his wife, to me personally known to be the identical persons whose names are subscribed to, and who are described in, and who executed, the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Mary A. Henarie, on examination, separate and apart from her husband, duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL.) EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

On this 11th day of August, A. D. 1884, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared P. J. Martin and Margaret A. Martin, his wife, to me

personally known to be the identical persons whose names are subscribed to, who are described in, and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned: and the said Margaret A. Martin, on examination, separate and apart from her husband, duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL.) EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA, City and County of San Francisco. } ss.

On the 25th day of August, A. D. 1884, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared Eleanor Martin (widow), to me personally known to be the identical person whose name is subscribed to, who is described in, and who executed the annexed and within instrument, and she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL.) EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

DISTRICT OF COLUMBIA, City and and County of Washington. } ss.

On the 12th day of September, A. D. 1884, before me, John E. Beall, a commissioner of deeds for the State of Oregon, in and for the District of Columbia, duly appointed, commissioned and sworn, and residing in the City of Washington, D. C., personally appeared Barton L. Walker and Genevieve E. Walker, his wife, to me personally known to be the identical persons

whose names are subscribed to, and who are described in, and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned: and the said Genevieve E. Walker, on examination, separate and apart from her said husband, duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(SEAL.) JOHN E. BEALL,
Commissioner of Deeds for the State of Oregon
in and for the District of Columbia.

STATE of OREGON,
County of Wasco. } ss.

I, George H. Thompson, county clerk in and for said Wasco County, and ex-officio clerk of the County Court of the State of Oregon for the County of Wasco, do hereby certifiy that I have compared the foregoing with the original deed from Peter Donahue, *et al.*, to the Eastern Oregon Land Company, and bearing date August 11, 1884, as the same now appears of record at pages 119, 120, 121, 122, 123 and 124 of Volume "J," Records of Deeds for Wasco County, Oregon, now in my office and custody: and that it is a true and correct transcript therefrom, and of the whole of said original deed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 2nd day of September, 1887.

GEORGE H. THOMPSON, Clerk,
(SEAL.) By J. M. HUNTINGTON, Deputy Clerk,

And afterwards, to wit, on the 29th day of August, 1889, there was issued out of said court a subpena ad respondendum in words and figures as follows, to wit:

DISTRICT OF OREGON—ss.

I certify that on the 7th day of September, 1880, at The Dalles, Oregon, Wasco County, in said district, I duly served the within copy of subpena ad respondendum upon the therein named C. N. Thornby by serving upon his wife at their home; also upon Edward Martin at the Umatilla House by delivering

to them personally a true copy of said subpena ad respondendum duly certified to by me as United States Marshal, duly certified to by the clerk of the United States Circuit Court for said district.

JOHN MYERS,
United States Marshal.
By W. W. ROBERTS, Deputy.

DISTRICT OF OREGON—ss.

I certify that on the 2d day of September, 1889, at Portland, Oregon, Multnomah County, in said district, I duly served the within subpena ad respondendum upon the therein named D. V. B. Henarie, by serving on J. K. Kelly, who accepted service as attorney for D. V. B. Henarie, by delivering to him personally a true copy of said summons duly certified to by me as United States Marshal.

JOHN MYERS,
United States Marshal.
By C. N. WAIT, Deputy.

DISTRICT OF OREGON—ss.

I certify that on the 2d day of September, 1889, at Portland, Multnomah County, in said district, I duly served the within subpena ad respondendum upon the therein named Eleanor Martin, by serving on J. K. Kelly, who accepted service as attorney for Eleanor Martin, by delivering to him personally a true copy of said summons duly certified to by me as United States Marshal.

JOHN MYERS,
United States Marshal.
By C. N. WAIT, Deputy.

DISTRICT OF OREGON—ss.

I certify that on the 2d day of September, 1889, at Portland, Multnomah County, in said district, I duly served the within subpena ad respondendum upon the therein named Eastern Oregon Land Company, by serving on J. K. Kelly, who accepted service as attorney for said Eastern Oregon Land Company, by delivering to him personally a true copy of said summons duly certified to by me as United States Marshal.

JOHN MYERS,
United States Marshal.
By C. N. WAIT, Deputy.

DISTRICT OF OREGON—ss.

I certify that on the 31st day of August, 1889, at Portland, Or., Multnomah County, in said district, I duly served the within summons upon the therein named James K. Kelly, by delivering to him personally a true copy of said summons duly certified to by me as United States Marshal.

JOHN MYERS,
United States Marshal.
By C. N. WAIT, Deputy.

DISTRICT OF OREGON—ss.

I certify that on the 31st day of August, 1889, at Portland, Oregon, Multnomah County, in said district, I duly served the within summons upon the therein named Dalles Military Road Company, by delivering to the President of said company, J. K. Kelly, personally, a true copy of said summons duly certified to by me as United States Marshal, together with a copy of the complaint in the within entitled suit duly certified to by the clerk of the United States Circuit Court for said district.

JOHN MYERS,
United States Marshal.
By C. N. WAIT, Deputy.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, Complainant,

*vs.*

THE DALLES MILITARY ROAD COMPANY, JAMES K. KELLEY, C. N. THORNBURY, ELEANOR MARTIN, P. J. MARTIN, D. V. B. HENARIE, MARY A. HENARIE, T. J. MARTIN, MARGARET A. MARTIN, JAMES V. MARTIN, THOMAS S. MARTIN, ADA B. MARTIN, EDWARD MARTIN, BARTON L. WALKER, GENEVIEVE E. WALKER and the EASTERN OREGON LAND COMPANY, defendants. } In Equity. No. 1612

*Subpœna ad respondendum.*

The President of the United States of America to the Dalles Military Road Company, James K. Kelly, C. N. Thornbury,

Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company, greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the court-room thereof, in the City of Portland, in said district, on the first Monday of October next, which will be the 7th day of October, A. D. 1889, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein the United States, is complainant and you are defendants, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpena and to have then and there the same.

Hereof fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said Circuit Court, affixed at Portland, in said district, this 29th day of August, in the year of our Lord one thousand eight hundred and eighty nine, and of the Independence of the United States the one hundred and——

R. H. LAMSON, Clerk.

(L. S.) By R. B. LAMSON, Deputy Clerk.

---

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

[Endorsed]: No. 1612. In the Circuit Court of the United States for the District of Oregon. In equity. The United States vs. Dalles Military Road Co., et al. Subpœna ad respondendum.

[Endorsed]: Returned and filed April 17, 1890.

R. H. LAMSON, Clerk.

By R. B. LAMSON, Deputy Clerk.

And afterwards, to-wit: on the 12th day of September, 1889, there was duly filed in said Court a praecipe for appearance of certain defendants, in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES,
*vs.*
DALLES MILITARY ROAD COMPANY, ET AL. } No. 1612.

*To the Clerk of the above-entitled Court:*

You will please enter my appearance as solicitor in the above entitled cause for the defendants, Dalles Military Road Co, J. K. Kelly and C. N. Thornbury.

JAMES K. KELLY,
Solicitor for above defendant.

[Endorsed]: No. 1612. In the Circuit Court of the United States for the District of Oregon. United States vs. Dalles Military Road Co. et al. Praecipe for appearance of defendants Dalles Military Road Co., J. K. Kelley and C. N. Thornbury.

[Endorsed]: Filed and entered September 12, 1889.

R. H. LAMSON, Clerk.

By R. B. LAMSON, Deputy Clerk.

And afterwards, to-wit: on the 12th day of September 1889, there was duly filed in said Court exceptions to bill in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the Dirtrict of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, T. S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company, defendants.

Exceptions taken by The Dalles Military Road Company, James K. Kelly and C. N. Thornbury, three of the above named defendants, to the bill of complaint of the plaintiff.

These defendants except to all the parts of said bill herein described as being matter not material to said suit and which cannot aid the plaintiff in obtaining the relief sought by said bill, and prays that they may be expunged with costs, to-wit:

First exception. For that said signature is impertinent from and after the word "effect," in the third line of the third paragraph of said bill, to the end of said paragraph.

Second exception. For that said bill is impertinent from and after the word "same," in the fourth line of the eighth paragraph of said bill, to the end of said paragraph.

Third exception. For that the said bill is impertinent in the sixteenth paragraph by containing the words "and maintained" in the 9th line: also the words "or maintained" in the 14th line: also the words "or maintained" in the 18th line, also the words "or maintained" in the 21st line of said paragraph.

JAMES K. KELLY,
Solicitor for said defendants.

[Endorsed]: Filed September 12, 1889.
R. H. LAMSON, Clerk.

And afterwards, to wit, on the 17th day of September, 1889, there was duly filed in said court a præcipe for appearance of defendants, in words as figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

UNITED STATES
*vs.* } No. 1612.
DALLES MILITARY WAGON ROAD CO. ET AL.

To the clerk of the above entitled court:

You will please enter my appearance as solicitor in the above entitled cause for the defendant.

JAMES K. KELLY.
By C. E. S. WOOD, of Counsel.

(Endorsed): No. 1612. In the Circuit Court of the United States for the District of Oregon. United States vs. Dalles Military Road Co. et al. Præcipe for appearance of defendants.

[Endorsed:] Filed and entered September 17, 1889.
R. H. LAMSON, Clerk.
By D. W. STEVENS, Deputy.

And afterwards, to wit, on the 17th day of September, 1889, there was duly filed in said court a petition for leave to file double pleas in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, complainant,
*vs.*
ELEANOR MARTIN, P. J. MARTIN, D. V. B. Henarie, Mary A. Henarie, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, defendants.

Your petitioner, the defendants above named, showeth that the complainant, having exhibited its bill in this honorable court against your petitioner, and your petitioner having entered their appearance in the above entitled suit, your petitioner is now advised that it will be inconvenient and against equity and the full administration of justice to be required to plead singly in this suit: that there are several distinct and separate defenses to the entire subject-matter of the bill, which defenses do not involve the expenses, trouble and delay of making issue on the actual construction of the road and taking testimony in such issue, and your petitioner showeth that he ought to be allowed to enter more than one plea to the bill.

Wherefore your petitioner prays for an order allowing him to plead more than one plea to the bill filed herein, to wit.

1. Bona fide purchase.
2. Delays, laches and estoppel.
3. Effect of Governor's certificate.

JAMES K. KELLY,
Solicitor for Defendants.

[Endorsed]: Filed September 17, 1889.
R. H. LAMSON, Clerk.

And afterwards, to wit, on the 2d day of October, 1889, there was filed in said court an answer of defendant Edward Martin in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants.

The answer of Edward Martin, one of the defendants, to the bill of complaint of the United States:

This defendant in answer to the said bill says that he has not and does not claim to have any right, title or interest in any of the matters in question in this suit, and disclaims all right, title and interest, legal and equitable, in any of said matters, and he further says that if he had been applied to by the plaintiff before the filing of the said bill of complaint he would have disclaimed all such right, title and interest; and he therefore submits that the said bill ought to be dismissed as against him with costs.

EDWARD MARTIN.

STATE OF OREGON, }
County of Wasco. }

Edward Martin, the above named defendant, being duly sworn according to law, says that the foregoing answer, by him subscribed, has been read to him, and he knows the contents thereof, and the same is true of his own knowledge.

EDWARD MARTIN.

Subscribed and sworn to before me, this 1st day of October, A. D. 1889.

B. S. HUNTINGTON,
U. S. Commissioner.

[Endorsed]: Filed October 2, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 7th day of October, 1889, there was duly filed in said court a praecipe for appearance in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES,
*vs.*
THE DALLES MILITARY ROAD CO., *et al.* } No. 1612.

*To the clerk of the above entitled court:*

You will please enter my appearance as solicitor in the above entitled cause for the defendants, Eleanor Martin, D. V. H. Henarie, and The Eastern Oregon Land Company.

JAMES K. KELLY.

[Endorsed:] No. 1612. In the Circuit Court of the United States for the District of Oregon. The United States vs. The Dalles Military Road Company, *et al.* Praecipe for appearance of defendants, Eleanor Martin, D. V. B. Henarie & E. O. Land Co.

[Endorsed]: Filed and entered October 7, 1889. R. H. Lamson, by R. B. Lamson, deputy.

And afterwards, to wit, on Monday, the 7th day of October, 1889, the same being the first judicial day of the regular October term of said cou t; present, the Honorable Lorenzo Sawyer, United States Circuit Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES,
*vs.*
THE DALLES MILITARY ROAD COMPANY, *et al.* } No. 1612.

October 7, 1889.

This cause was heard upon the motion of certain of the defendants for leave to file more than one plea to the bill herein, and upon the exceptions of the defendants, the Dalles Military Road Company, James K. Kelly and C. N. Thornbury to said bill and was argued by Mr. Lewis L. McArthur, United States attorney, and Mr. Wm. Carey Johnson, special assistant U. S. attorney for the plaintiff, and by Mr. James K. Kelly of counsel for the defendants; on consideration whereof, it is ordered that said motion be, and the same is hereby allowed, and that said exceptions be, and the same are hereby sustained.

And afterwards, to wit, on the 7th day of October, 1889, there was duly filed in said court an opinion by the Court in words and figures, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD Company *et al.* } No. 1612.

1. PUBLIC LANDS—GRANTS—DALLES MILITARY ROAD.

Monday, October 7th, 1889.

Act Cong. February 25, 1867, (14 St. 409), granted to the State of Oregon lands to aid in the construction of a military wagon road from Dalles City to Fort Boise. Section 3 of the act provides, that "said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such special manner as the State of Oregon may prescribe." By an act passed October 20th, 1868 the State of Oregon transferred the grant to the Dalles Military Road Company, but prescribed no "special manner" for constructing the road. Held, that these two acts formed the entire statutory contract with the road company, and that the statute of Oregon, October 14th, 1862, relative to the construction of roads to private corporations, which had no reference to this specific road or grant did not affect the question between the United States and the road company as to whether the latter had constructed the road in the manner and within the time as prescribed by the act of Congress.

2—SAME.

There being nothing in either act requiring the road company, or any one claiming under it, to maintain the road after it had been once completed and accepted by the government in accordance with the provisions of the acts, without any such fraud as to vitiate the acceptance, its right to the lands against the United States vested irrevocably upon such acceptance.

In equity. Bill to forfeit lands. On exceptions to portions of the bill for impertinence.

L. L. MCARTHUR, U. S. Atty., and
W. C. JOHNSON,

For Plaintiff.

JAMES K. KELLY, C. E. S. WOOD, and
DOLPH & BELLINGER,

For Defendants.

Before Sawyer, Circuit Judge.

SAWYER, J.: The first paragraph of the bill sets out the substance of the act of Congress, passed February 25, 1867, entitled "An act granting lands to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise on the Snake River," found in 14 U. S. St. 409. The second paragraph in like manner sets out the substance of the statute of Oregon, passed October 20, 1868, entitled "An act donating certain lands to Dalles Military Road Company," found in the statutes of Oregon for 1868, p. 3. Notwithstanding these allegations in the second paragraph, it is alleged in the third "that the State of Oregon never, at any time, passed any laws whatsoever for the specific purpose of carrying the act of Congress into effect," meaning only, it must be presumed, in view of the preceding allegations of the bill, that it never passed any law other than that set out, or any law prescribing any "other special manner" of constructing the road than that prescribed in the said act of Congress, as it was authorized to do by section 3 of that act. The bill then proceeds to aver: "But long before the passage of the act of Congress," the State Legislature did pass "an act providing for private corporations, and the appropriation of private property therefor," which act provided that any road constructed by such corporation should be constructed in a certain manner, of a certain width, etc., fully described in the act; also for bridging and ferrying streams, with many other particulars, and that said act has been in force at all times since its passage on October 14, 1862.

This passage is excepted to as impertinent, the said statute being as contended, inapplicable, and having no relation to the road as constructed or required to be constructed by the defendant, The Dalles Company, under and in pursuance of the Congressional grant to the State of Oregon, and the statute of Oregon set out in the bill transferring the said grant to The Dalles Company upon the same "conditions and limitations" as in the act of Congress prescribed, and no others. I am satis-

fied that this exception must be sustained. Section 3 of the act of Congress provides "that said road shall be constructed with such width, gradation and bridges as to permit of its regular use as a wagon road and in such special manner as the State of Oregon may prescribe." Congress was providing for the construction of this particular road and made no reference to any other road, or any existing statute of Oregon. It does not say, in "such special manner" as the statutes of Oregon have heretofore provided "for road constructed under its authority and laws," or "in such 'special manner' as the laws of Oregon now provide for the construction of roads, toll or otherwise, by corporations or private parties," but in such other "special manner, as the State of Oregon may prescribe." That is to say, may hereafter prescribe, when regranting the lands to aid in the construction of the road, or in hereafter contracting with parties to construct the road, either for the lands, or for a money consideration, to be paid in whole, or in part, out of the proceeds of the lands. The act of Congress evidently contemplates future, not past action—such "other special manner" as the State may prescribe for this particular road—not such as it has already heretofore prescribed for other roads, toll or otherwise. This is the only limitation prescribed by Congress in this particular.

Upon examining the statute of Oregon transferring the Congressional grant to The Dalles Military Road Company it will be seen that no "special manner" of constructing the road was therein prescribed, and The Dalles Company was not limited to any description of road to be constructed other than that found in the act of Congress itself. The statute is a special, independent act, limited to the very object named in and contemplated by the act of Congress, and referring to no other road or object. In the preamble it recites the act of Congress verbatim in full, and then provides "that there is hereby granted to Dalles Military Road Company, incorporated, * * * all lands, right of way, rights, privileges and immunities heretofore granted or pledged to this State by the act of Congress, in this act heretofore recited, and for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed." (Laws 1868, p. 5.) There is no

reference to any prior statute of Oregon and no description at all of the road to be constructed by the defendant; no "special manner" prescribed: nothing except the description in the act of Congress itself. It simply adopts the provisions of that statute, and by that act the rights of The Dalles Company, so far as governing the land grant under the act of Congress is concerned, are entitled to be judged. This is special legislation relating to a single specific subject-matter, and we are not to import into it other conditions which the Legislature has itself omitted to incorporate. As the State of Oregon in transferring the Congressional grant of land to the defendant in consideration of its building the road, did not prescribe any "special manner" in which it should be built, or any manner other than that prescribed by Congress itself, when the conditions prescribed by the act of Congress were performed within the time limited, the right to the lands became fully and irrevocably vested. The terms of the statutory contract between the State and The Dalles Company are found in the two acts, the act of Congress granting the lands to the State on the conditions alone prescribed in it, and the State act in express terms granting them to The Dalles Company upon precisely the same conditions and limitations, no other having been inserted. The act of the State of Oregon without other conditions therein than those prescribed in the act of Congress operated as a transfer or assignment to the company of the Congressional grant without restriction, and it was only necessary for the company to perform those conditions in order to become entitled to the lands. Prior legis ation, therefore, upon a subject-mattter having no reference to this specific road, or this specific land grant, cannot affect the question between the United States and these defendants as to whether the road was constructed by The Dalles Company in the manner and within the time prescribed in the act of Congress and the statute of Oregon strictly following the provisions of the act of Congress without prescribing any future conditions. It may have been necessary for The Dalles Company to perform conditions enjoined by the statutes of Oregon other than those prescribed by the acts now in question in order to entitle it to enjoy other rights under other laws of Oregon. But if so these conditions and the independent rights acquired by their performance are wholly out-

side of and foreign to this investigation, and with which we have no concern. Our inquiry is limited to the requirements of the statutory contract set out. The first exception must therefore be sustained, the matter excepted to being impertinent to this inquiry.

The next exception is to the allegation relating to maintaining the road after construction in case it was constructed in accordance with the act. The allegation is that the road "was not and never has been maintained as a public highway by either or any of the defendants herein, or any person or persons claiming any interest in the lands embraced within the limits provided for by the said act of Congress," and the other exceptions all relate to similar allegations as to "maintaining the road" after construction: not to a failure to construct the road in accordance with the contract. It is contended that these allegations are impertinent because the defendants, under the terms of the contract embodied in the act of Congress and the act of the Legislature of the State of Oregon, set out in the bill, were not under any obligations to maintain the road after it had been once constructed in accordance with the terms of the contract, and this view appears to me to be correct, so far as the vesting of the right of the defendant to the lands is concerned. I can find nothing in either act that requires The Dalles Company, or anybody holding under it, to maintain the road after it has been once completed in accordance with the terms of the statutory contract, and been approved and accepted by the Government through its agent for that purpose, duly appointed by the statute and contract, the parties acting in good faith, and there being no such fraud as should vitiate such approval and acceptance. The lands were granted in the words of the statute "to aid in the construction" of the road. "The lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose." After the completion of ten miles a quantity of land, "not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed." There is nothing said in either act about maintaining the road after its completion. When the road has been completed, honestly approved and accepted in accordance with the provisions of these two statutes, the contract has been fully executed on the part of The Dalles Com-

pany; and the contract having been fully performed, its right to the lands has irrevocably vested. The grant is *in præsenti*, and there is no provision for forfeiture in case the road is not afterwards maintained. It is provided that if the road is not "completed" within the time prescribed no more lands shall be sold, and those "unsold shall revert to the United States." But no provision is made for their forfeiture for not maintaining the road after completed. The contracting party, after completing the road in pursuance to the terms of the statute, might then abandon it and leave it to the State or the Government, or whoever else may have an interest in it, either to take care of it or allow it to go to destruction, so far as any rights or liabilities under these two statutes are concerned. As well might one who has contracted with a builder for the erection of a house upon certain specifications for a specific price, after the completion of the structure in accordance with the contract and acceptance of the house, require the builder to ever after maintain it in repair.

It must be remembered that we are now, in this suit, dealing with the rights only of these parties—the United States, and these defendants—arising out of this statutory contract for the construction of the road in question.

If the Dalles Military Road Company, or any of these defendants, after the full performance of this statutory contract and after their right to the land had fully vested under it, assumed to own and control this road, keep it as a toll-road as to all parties other than the United States, or exercised any other rights under other statutes of the State of Oregon, or if any liabilities accrued to the United States, the State of Oregon, or to private parties, arising under other statutes or laws of either the United States or the State of Oregon, that is a matter wholly foreign to the inquiry now before the court. We are to deal simply with this statutory contract, and even in relation to that, which is the only thing we could under any circumstances deal with, we are limited in our inquiry by the statute under which the suit is brought to three points:

(1.) We are to determine the question of seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part—not according to the terms of other acts, state or national.

(2.) The legal effect of the several certificates of the governor of the State of Oregon of the completion of said roads, and the right of resumption of said granted lands by the United States.

(3.) And we must determine these questions in a manner "saving and preserving the rights of *bona fide* purchasers of either of said grants or of any portion of said grants, for a valuable consideration." 25 U. S. St., 851.

There is nothing here said about "maintaining" the roads after construction. Manifestly, Congress in passing this act had no idea that the Dalles Company were required by either or both of the acts in question to maintain the road after completion in accordance with the statutory contract.

We are only to deal with the statutory contract for constructing the roads and ascertaining whether the contract in that particular has been performed wholly or in part, and, if not fully performed what are the rights of the parties under the governor's certificates, notwithstanding the failure to wholly or in part comply with the contract; and what are the rights of *bona fide* purchasers if these certificates can be successfully assailed and disregarded so far as participants in the fraud are concerned?

The case of Schultz vs. Military Road Co., 7 Or., 264, has been confidently cited as establishing a view different from that now adopted. In that case the question now under consideration was not necessarily or at all involved, and there was no occasion to determine whether the statutory contract was performed in such sense as to entitle the Dalles Company to lands in question, or whether, under the two acts now in question, considered by themselves, said company was required to maintain the road after completion in accordance with these statutes alone. The instruction under discussion in that case may have been entirely correct under the other general laws of Oregon, requiring parties who assume to own or at least control and operate a public road for tolls collected or other consideration. Liabilities may well accrue against such parties in favor of the United States, the State of Oregon, or private parties, for their neglects or violation of duty. But, if so, the liability in question did not result alone from a breach of the statutory contract now under consideration, nor did the Court

so decide. The plaintiff was a private party, carrying the United States mail under a contract with the government. He did not sue on this statutory contract for a breach, either as an original party or as assignee of the United States. The United States were in no sense parties to the suit. The suit was for a breach of duty to maintain the road under the laws of Oregon, and the statutes in question were drawn in to show a right to use the road without charge. But if the Court intended to assert—which I do not think it did— that this statutory contract alone required the Dalles Company to maintain this road after it had been completed according to the contract and accepted, then I cannot concur in that view. That case might have been, indeed should have been, and it doubtless was disposed of upon entirely different considerations; upon the rights of the parties arising out of an assumption on the part of the company to own and control the road and to collect tolls thereon under other laws of Oregon. The right to collect tolls is a franchise granted only by the State. There was no such franchise granted by the acts in question. The case shows that it was decided in 1879, and arose many years after the road was required to be completed by the act of Congress of 1867, in question: that the defendant therein was a corporation organized under the laws of Oregon "for the purpose of constructing and maintaining" the road "and collecting toll thereon" (7 Or., 259): "that it neglected to construct the road in accordance with said acts of Congress and of the Legislature of Oregon" (Id., 260), and the answer admits the incorporation to build the road and "collect tolls" (Id., 261). Manifestly, then, the corporation was in the exercise and enjoyment of other franchises and different rights than those derived under the acts of Congress and legislation of Oregon, now in question, for neither of those acts makes any reference whatever to any such franchise or rights, and other laws of Oregon were properly before the Court for consideration in that case, and doubtless it was upon these laws that the opinion of the Court was predicated.

There seems to be some confusion of ideas in the theory upon which that case was presented. The two acts now under consideration, constituting a statutory contract for the construction of this road, have no necessary connection with that

case, except so far as to exempt the United States from tolls, unless by virtue of other statutes in no wise affecting the contract with which we are dealing and the rights of the United States and these defendants under it. That road might just as well have been constructed under the acts in question by any other corporation or private individual had the grant been assigned to them, and, having been completed and accepted, and the contractor having afterwards withdrawn, The Dalles Military Road Company might then have taken possession of the completed road under other statutes of Oregon, and kept and maintained it as a toll road, in the management of which many obligations and liabilities might have arisen having no relation whatever to the acts and statutory contract for the mere construction of the road. There is no necessary connection whatever between this statutory contract and its performance or non-performance and the maintaining and operating of this road as a toll road after its completion and acceptance by the parties constructing it or otherwise; and the rights of the United States and the defendants, under these specific statutes, cannot in any way be affected by the arrangement between the State and the Dalles Company and its grantees made under other statutes having no special reference to the construction of the road under the acts in question. The rights resting upon different statutes must stand or fall upon the statutes applicable to the specific subject-matter, and can neither be aided nor impaired by other acts having no relation to them. The one class should not be confounded with the other. Undoubtedly this road, having been constructed under the act of Congress, the State could not impose or authorize others to impose tolls or other charges upon the United States, or prevent its use, free from tolls or other charges, by the Government for the transportation of any property, troops, or mails. The Supreme Court of Oregon, therefore, might very properly have affirmed the correctness of the charge given in the case cited upon other statutes of Oregon, either alone or in conjunction with the act of Congress in question, without at all considering the questions now before the Court as to what is required to be done by the Dalles Company by the statutory contract now under consideration unaffected by other statutes. The

questions in the two cases are entirely distinct, and should not be confounded.

Upon the views expressed, all the exceptions to the bill for impertinence must be sustained, and it is so ordered.

(Signed.) SAWYER,
Circuit Judge.

UNITED STATES,
*vs.*
OREGON CENT. MILITARY ROAD CO., *et al.*

*Circuit Court, District of Oregon, October 7, 1889.*

*Per curiam:* Similar questions are presented in this case, and the exceptions must be sustained upon the same grounds.

[Endorsed]: Filed October 7, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 17th day of October, 1879, there was duly filed in said court an answer of defendant, Margaret A. Martin, in the words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company, defendants.

The answer of Margaret A. Martin, one of the defendants to the bill of complaint of the United States.

This defendant, in answer to the said bill, says that she has not, and does not claim to have, any right, title, or interest in any of the matters in question in this suit, and disclaims all right, title and interest, legal and equitable, in any of said matters: and she further says that if she had been applied to by the plaintiff, before the filing of the said bill of complaint, she would have disclaimed all such right, title and interest;

and she therefore submits that the said bill ought to be dismissed as against her with costs.

MARGARET A. MARTIN.

STATE OF CALIFORNIA,
City and County of San Francisco. }

The above named defendant, being duly sworn according to law, says that the foregoing answer, by her subscribed, has been read by her, and she knows the contents thereof, and the same is true of her own knowledge.

MARGARET A. MARTIN.

Subscribed and sworn to before me, this 14th day of October, 1889.

J. C. KING,
(SEAL.) Notary Public.

Service of the within answer accepted by receiving a copy thereof October 17th, 1889.

U. S. Attorney.

[Endorsed]: Filed October 17th, 1889.

R. H. LAMSON, Clerk.
By R. B. LAMSON, Deputy.

And afterwards, to wit, on the 17th day of October, 1889 there was duly filed in said court a plea of defendants, D. V. B. Henarie, *et al.*, in the words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants.

The joint and several plea and accompanying answer of the defendants, D. V. B. Henarie, Eleanor Martin, P. J. Martin and

the Eastern Oregon Land Company, defendants to the bill of complaint of the United States, complainant:

These defendants by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of the said bill, or to so much and such part of the said bill as prays that the land granted to the State of Oregon by the act of Congress of date February 25, 1867, and now owned by these defendants, be decreed forfeited to the United States.

That George L. Woods, then the Governor of Oregon, without any false or fraudulent representations having at any time been made to him by the officers, stockholders or agents of The Dalles Military Road Company, or any other person or persons in its or their interest, and without any one or more of them having falsely or fraudulently induced him to certify that the road of said company was constructed in accordance with law, and without any fraud whatever on his part, on the 23d day of June, 1869, certified that the plat or map of The Dalles military road had been filed in his office by The Dalles Military Road Company, and showed the location of the line of route as actually surveyed and upon which its road had been constructed in accordance with the requirements of the act of Congress, approved February 25, 1867, entitled "An act granting land to the State of Oregon to aid in the construction of a military wagon road from Dalles City on the Columbia River to Fort Boise on the Snake River": and also with an act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, entitled "An act donating certain land to Dalles Military Road Company."

That he made a careful examination of said road since its completion, and that the same was built in all respects as required by the above recited acts, and that said road was then accepted, as will more fully appear by said certificate of the Governor of Oregon, a copy of which is set forth in paragraph five (5) in the bill of complaint, and which is made a part of this plea.

That on the 31st of May, 1876, The Dalles Military Road Company, for a valuable consideration—to wit, the sum of $125,000, to it paid by Edward Martin, of San Francisco, in

the State of California—sold and by deed conveyed all of said granted lands belonging to it to said Edward Martin, his heirs and assigns.

That by sundry mesne conveyances from the said Edward Martin to the Eastern Oregon Land Company, one of these defendants, the title to said lands became and now is vested in said Eastern Oregon Land Company.

And for a second plea, filed by leave of the Court, the defendants say:

That on June 23d, 1869, the Govenor of Oregon certified that the plat or map of the Dalles Military Road had been duly filed in the executive office: That it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled "An act granting land to the State of Oregon to aid in the construction of the military wagon road from Dalles City on the Columbia River, to Fort Boise on Snake River", and with the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, entitled "An act donating certain land to the Dalles Military Road Company."

And the Governor of Oregon then further certified that he had made a careful examination of said road since its completion, and that the same was built in all respects as required by the said above recited acts, and was then accepted, as will more fully appear by the fifth paragraph of the said Bill of Complaint.

That on December 18th, 1869, the Commissioner of the General Land Office withdrew from sale the odd numbered sections within three miles from each side of the said road in favor of the Dalles Military Road Company.

That Congress by an act approved June 18th, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases." provided that in all cases where lands had been granted by Congress to the State of Oregon to aid in the construction of certain military wagon roads; and the certificate of the Governor of Oregon should show that any such road had been constructed and completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands unless the State should by

public act have transferred its interest in such lands to any corporation, in which case the said lands were to be patented to such corporation, as will more fully appear by the eleventh paragraph of the bill of complaint.

That Edward Martin, then a resident of San Francisco, in the State of California, placing confidence in the truth of the certificate of the Governor of the State of Oregon, dated June 23d, 1869, that the said Road had been duly constructed according to the requirements of the said act of Congress, approved February 25, 1867, and also placing confidence in the order of the Commissioner of the General Land Office dated December 18, 1869, withdrawing the said lands from sale in favor of the Dalles Military Road Company; and also believing that the said act of Congress, approved June 18, 1874, would be carried into effect by issuance of patents to the Dalles Military Road Company for all of said lands, did on the 31st day of May, 1876, purchase in good faith for a valuable consideration, to wit, the sum of one hundred and twenty-five thousand dollars, then paid by said Edward Martin to said Dalles Military Road Company, all the lands embraced in the grant to said company, except such portions thereof as had previously been sold by it. That previous to the time of paying the sum of $125,000, purchase money, and receiving said deed, the said Edward Maritn had no notice of any failure on part of the Dalles Military Road Company to construct and complete the said road in accordance with the requirements of said act of Congress, approved February 25,1867, and he had no reason to believe that the same was not constructed in accordance with the said act of Congress, but, on the contrary, he was informed and believed that said road had been constructed with such width, gradation and bridges as to permit of its regular use as a wagon road.

That thereupon the said Edward Martin became and was the *bona fide* purchaser, for a valuable consideration, of all said lands owned by The Dalles Military Road Company, which were then conveyed to him by said corporation, as will more fully appear by its deed, a copy of which is attached to the Bill of Complaint, marked Exhibit "B," and dated May 31, 1876.

That the said Edward Martin afterwards, to-wit, on Janu-

ary 31, 1877, executed and delivered to D. V. B. Henarie, one of the defendants, a deed of trust wherein he acknowledged that said D. V. B. Henarie was the owner of the undivided fourth of all the lands mentioned and described in said deed of The Dalles Military Road Company to said Edward Martin, and that he held the same in trust for said D. V. B. Henarie, which deed of trust was recorded in Wasco County, State of Oregon, on May 7, 1884, in Vol. A, page 265, in Miscellaneous Records; also in Baker County, Oregon, on May 10, 1884, in Vol. 2, page 317, in Records of Leases and Agreements; and also in Grant County, Oregon, on May 27, 1884, in Book A, page 584 of Miscellaneous Records.

That when said Edward Martin purchased said lands on May 31, 1876, as hereinbefore stated, said D. V. B. Henarie paid the one-fourth of the consideration for the same, to-wit, one-fourth of one hundred and twenty-five thousand dollars. That he made said purchase in good faith, relying upon the certificate of the Governor of Oregon that said road had been constructed according to the act of Congress approved February 25, 1867, and also relying upon the act of Congress approved June 18, 1874, that patents in due form of law would be issued to The Dalles Military Road Company for said lands. That he had no notice at the time he paid one-fourth of said purchase money; and when said deed was executed and delivered to said Edward Martin, that said road had not been constructed and completed by The Dalles Military Road Company as required by said act of Congress of February 25, 1867.

That afterwards, to-wit, on the 12th day of May, 1880, the said Edward Martin died intestate in the City of San Francisco, in the State of California, leaving a widow, the defendant, Eleanor Martin, and leaving as his heirs-at-law, Thomas S. Martin, Edward Martin and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors. That in March, 1882, the interest of said minors in said lands was sold at a guardian's sale, by order of the County Court of Wasco County, Oregon, at which sale the interest of said minors in said lands was purchased in good faith for a valuable consideration by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear

by Exhibit "C," attached to bill of complaint. That on August 3rd, 1882, the said James Phelan sold his interest in said lands to Peter Donahue, as will more fully appear by Exhibit "D," attached to the bill of complaint.

That on the 11th day of August, 1884, all of the heirs of said Edward Martin, and all persons who held an interest by purchase in said lands, to wit: P. J. Martin, Eleanor Martin, D. V. B Henarie, Peter Donahue, Edward Martin, James V. Martin, Thomas S. Martin, Genevieve E. Walker and Joseph W. Winans sold and by deed conveyed all their interest in the said lands and land grant to the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California, having its office in the City of San Francisco, in the State of California, as will more fully appear by Exhibit "E," attached to the bill of complaint.

That the Eastern Oregon Land Company now holds the legal title to all the lands granted to the Dalles Military Road Company, except such as have heretofore been sold and conveyed by the Dalles Military Road Company, and its grantees, and the said Eastern Oregon Land Company.

All which matters and things these defendants do aver to be true, and they plead the said matters in bar to the plaintiff's bill of complaint, and pray the judgment of this Honorable Court whether they ought to be required to make any other or further answer to said bill, and pray to be hence dismissed with their costs and charges in that behalf, wrongfully sustained.

JAMES K. KELLY,
Solicitor for Defendants.

UNITED STATES OF AMERICA, }
District of Oregon. }

I, James K. Kelly, of counsel for the above named defendants, do hereby certify that in my opinion the foregoing plea of said defendants is well founded in point of law.

JAMES K. KELLY,
Solicitor for Defendants

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

We, D. V. B. Henarie, Eleanor Martin and P. J. Martin, and D. V. B. Henarie, president Eastern Oregon Land Company,

being duly sworn according to law, do say that we are defendants in the above entitled suit, that the foregoing plea is not interposed for delay, and that it is true in point of fact.

D. V. B. HENARIE.
ELEANOR MARTIN.
P. J. MARTIN.
D. V. B. HENARIE,
President Eastern Oregon Land Company.

Sworn to before me this 12th day of October, 1889.

(SEAL.) F. D. MONCKTON,

Deputy Clerk and Commissioner U. S Circuit Court, Northern District California.

[Endorsed]: Filed October 17, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 17th day of October, 1889, there was duly filed in said court an answer of defendants, D. V. B. Henarie, *et al.*, in support of plea, in words and figures, as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company, defendants.

To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon:

The answer of Eleanor Martin, P. J. Martin and D. V. B. Henarie and the Eastern Oregon Land Company, defendants in the above entitled suit to the bill of complaint of the United States, complainant, accompanying the plea of these defendants, and fortifying the same and not waiving the plea.

These defendants now and at all times hereafter saving to themselves all, and all manner of exceptions or otherwise that may or can be taken to the many errors, uncertainties and imperfections in the said plaintiff's bill contained for answer thereto, or to so much thereof as these defendants are advised it is necessary or material for them to make answer to, answering say:

In answer to paragraph I of the said bill these defendants admit that all the allegations therein contained are true.

In answer to paragraph II of said bill these defendants admit that all the allegations therein contained are true.

In answer to paragraph III of said bill these defendants admit that all the allegations therein contained are true, but they deny that the said act of the Legislative Assembly of the State of Oregon, approved October 14, 1862, had any application to the manner of constructing the wagon road of The Dalles Military Road Company.

In answer to paragraph IV of the said bill these defendants admit that all the allegations contained therein are true.

In answer to paragraph V of the said bill these defendants admit that the Governor of Oregon, on the 23d day of June, 1869, made and executed the certificate copied in the said paragraph, but they say they have no knowledge or information upon the subject, but they believe that neither on the 1st day of January, 1869, nor on divers days between that day and the 23d day of June, 1869, nor at any other time, the officers, stockholders or agents of The Dalles Military Road Company, or any one of them, or any other person or persons acting in their interest or in the interest of the said company, falsely or fraudulently represented to George L. Woods, then the Governor of Oregon, or to any other person, that said road had been constructed as by law required, or that they, the said officers, stockholders, agents and representatives and any other persons aforesaid, or any one or more of them, then or there or at any time knew that any such representations were false, or that the said road had not been constructed according to law. And these defendants believe that no such false or fraudulent representations as alleged in the said bill were ever made by any of the said officers, stockholders, agents and representatives of The Dalles Military Road Company, or any person or persons

in its behalf, for the purpose of fraudulently procuring from the said George L. Woods, Governor of Oregon, any certificate declaring that the said road had been constructed in accordance with the act of Congress approved February 25, 1867, and the act of the Legislative Assembly of the State of Oregon approved February 20, 1868.

And these defendants deny that the certificate of George L. Woods, Governor of Oregon, a copy of which is set forth in paragraph V of said bill, was made and issued through any false or fraudulent representations by the officers, stockholders or agents of The Dalles Military Road Company, or of any person or persons in its interest, as alleged in said paragraph V of said bill.

In answer to paragraph VI of said bill, these defendants deny the allegations contained therein; and they say that The Dalles Military Road Company had on and prior to the said 23d day of June, 1869, a road upon the line of route located and surveyed by said company, and within the limits of the grant of land, constructed and completed according to the requirements of the act of Congress approved February 25, 1867, and this the Governor of Oregon, George L. Woods, well knew from an examination thereof made by him, and by due and sufficient proof to his satisfaction.

In answer to paragraph VII of the said bill, these defendants say that they believe that said certificate was not procured by The Dalles Military Road Company through or by any false or fraudulent representations made by the officers, stockholders, agents, or any person or persons connected with or in the interest of the said company, in order to enable it falsely or fraudulently, or in any way, to obtain possession and control of the lands lying within the limits of the land grant provided in said act of Congress. And deny that the acceptance of said wagon road by the Governor of Oregon was a fraud upon the United States; and on the contrary, these defendants say that the said road was constructed as required by law, and fairly accepted by the Governor of Oregon as before stated.

In answer to paragraph VIII of the said bill, these defendants say that the said road was constructed in whole through its entire length, with such width, gradation and bridges as to permit of its regular use as a wagon road, and so as to be a

public highway, and permit the transportation of property, troops and mails of the United States over the same. And these defendants deny that they were ever required by law to maintain the same as a public highway, by any law of Congress, or by any act of the Legislative Assembly of the State of Oregon.

In answer to paragraph IX of the said bill, these defendants say that in the construction of the road of The Dalles Military Road Company, there was expended by that company and The Dalles and Boise Wagon Road Company, its immediate predecessor and vendor, and by persons from whom The Dalles Military Road Company purchased portions of its road, in all about eighty thousand dollars; and that the lands granted to the said company in pursuance of the said act of Congress, to aid in the construction of said road, were applied to the reimbursement of the moneys so expended in the construction of said road.

In answer to paragraph X of said bill, these defendants say that the bonds granted by the said act of Congress were disposed of for the purpose of reimbursing the Dalles Military Road Company and its stockholders for money expended in the construction of the said road, as hereinbefore stated.

In answer to paragraph XI of the said bill, these defendants admit that the allegations contained therein are true.

In answer to paragraph XII of the said bill, these defendants admit that patents for a portion of the lands included in the grant made by said act of Congress were issued to the Dalles Military Road Company; and they believe the amount or number of acres specified in exhibit "A," attached to the bill, to wit, 126,910 23-100, is correct. But these defendants deny that on the 19th day of June, 1876, or at any other time, the President of the United States, or any other officer of the government, was deceived, misled or imposed upon by the false, or any false and fraudulent certificates hereinbefore set forth, and was thereby induced to issue the said patent or patents, and these defendants say that the said patents were fairly and properly issued to the said Dalles Military Road Company.

In answer to paragraph XIII of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph XIV of the said bill, these defendants admit that the allegations contained therein are true.

In answer to paragraph XV of the said bill, these defendants say that the same is not a correct statement of the length of the said road. That the said road was surveyed after its completion, to wit, between April 22 and May 17, 1869, by David P. Thompson, and the length of said road from the court house in Dalles City, to Fort Boise on Snake River, was 330 1-2 miles This and the time, when the survey was commenced and ended appears by the certificate on the map made by said D. P. Thompson. And these defendants deny that the Dalles Military Road Company inequitably claims the rigth to have a patent issued for all the land embraced within said grant not already patented to it.

In answer to paragraph XVI of the said bill, these defendants say that neither any one or more of them, nor the said Edward Martin, deceased, nor any person or persons holding title to the said lands through or under, him or to any portion of said lands at the time of the execution and delivery of the said deeds, or any one or more of said deeds, specified in the bill of complaint or the exhibits thereto attached, had full knowledge or any knowledge whatever that the road provided for by said act of Congress approved February 25, 1867, had not at any time been constructed as required by the said act of Congress and the act of the legislative assembly of the State of Oregon, approved October 20, 1868, so as to be in any sense whatever a public highway; or so that it could be used by the United States, or by any of the citizens or residents thereof as a public highway, or so that the United States could transport its property, troops or mails over the same. And they deny that they or any of them, or that the said Edward Martin, deceased, had full or any knowledge that no grades had been established, that no clearing had been done on any part thereof; no bridges built over any streams on the line thereof, and no cuts made, and no turnouts constructed anywhere on the line of road by the Dalles Military Road Company. And they deny that they or any of them had full or any knowledge that said road was not begun nor completed within five years from the date of the passage of said act of Congress, approved February 25, 1867, or that it had ever been begun or constructed. And they deny that they, or any of them, well knew or knew at all, that the statements made in the certificate of the

Governor of Oregon, hereinbefore set forth, were false: or that the Governor did not at any time whatsoever examine the road referred to in his certificate, or that the said certificate had been procured by false or fraudulent representations, or that the patent aforesaid was found to be issued upon said false and fraudulently procured certificate.

And these defendants, further answering, say they are informed and believe that the said road of the Dalles Military Road Company was constructed over its entire length with such width, gradation and bridges as to permit of its regular use as a wagon road. That soon after the act of the Legislative Assembly of October 20, 1868, was passed, conferring upon said company the rights, privileges and grant of lands to aid in the construction of said road, the Dalles Military Road Company entered upon the work of constructing and completing the same. That when the said road was accepted by the Governor of Oregon, as hereinbefore set forth, and for more than a year before that time, large wagons, loaded with three to five tons of freight to each wagon, and drawn by three to four spans of horses or mules, and often by five or six yoke of oxen, would go from Dalles City to Canyon City, a distance of about one hundred and eighty miles. That these teams would go from Cross Hollows to Canyon City over the road of the Dalles Military Road Company, a distance of about ———— miles. That in making the trip these teams would meet returning teams and pass them without difficulty. That all the goods, wares and merchandise used and consumed in the mining camps in and around Canyon City, and its vicinity, were hauled over said military road from Cross Hollows to Canyon City, as well as goods, wares and merchandise used by settlers, farmers, etc., on the line of said road. That all the supplies used by the U. S. troops stationed at Camp Watson, Camp Harney and Camp Logan, in Grant County (except such as were procured in the vicinity of said military posts), were hauled or packed over a great portion of said military road. That the United States mails were carried on said road from Cross Hollows to Canyon City in passenger coaches drawn by four horses, and made regular trips, sometimes twice and sometimes three times a week, and returned in the same way.

And these defendants further say, that from and after the

time when The Dalles Military Road Company became entitled to the said grant of land by virtue of the act of the Legislative Assembly, approved October 20, 1868, the said road has remained a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any and all property, troops or mails of the United States; and that no tolls were ever collected by The Dalles Military Road Company from the United States since the said 20th day of October, 1868.

And these defendants deny all and all manner of unlawful combination and confederacy with which they are charged in said bill; without this that there is any other matter cause or thing in the complainant's said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct: and humbly pray to be hence dismissed with their reasonable costs and charges in their behalf, wrongfully sustained.

D. V. B. HENARIE.
ELEANOR MARTIN.
P. J. MARTIN.

D. V. B. HENARIE,
President Eastern Oregon
Land Company.

Attest: T. P. BEACH,
Secretary Eastern Oregon
Land Company.

JAMES K. KELLY,
(SEAL) Solicitor for Defendants.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

The answer of the defendant, the Eastern Oregon Land Company, was taken this 12th day of October, 1889, before me

under the common seal of the said corporation, as by their said seal thereto attached appears.

F. D. MONCKTON,
Deputy Clerk and Commissioner U. S Circuit Court, Northern District of California.

(U. S. Circuit Court Seal)

STATE OF CALIFORNIA, County of San Francisco. } ss.

On this 12th day of October, 1889, before me, personally appeared, D. V. B. Henarie, Eleanor Martin. D. V. B. Henarie, President of the Eastern Oregon Land Company, and P. J. Martin, and made oath that they have heard the foregoing answer read, and know the contents thereof, and that the matters and things set forth therein, so far as it relates to their own acts are true; and so far as it relates to the acts of others, they believe the same to be true.

And said D. V. B. Henarie, on oath, further says, that he is President of the Eastern Oregon Land Company, one of the defendants, and is familiar with its business affairs; that the facts set forth in the foregoing answer, so far as the same are stated on his personal knowledge, are true; and so far as not stated upon his personal knowledge, he believes the same to be true.

Before me this 12th day of October, 1889.

F. D. MONCKTON,
Deputy Clerk and Commissioner of U. S. Circuit Court, Northern District of California.

(U. S. Circuit Court Seal)

[Endorsed]: Filed October 17, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Wednesday, the 23d day of October, 1889, the same being the fifteenth judicial day of the regular October term of said court (present, the Honorable Matthew P. Deady, United States District Judge, presiding), the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

October 23, 1889.

Now, at this day, on motion of Mr. James K. Kelly, of counsel for certain of the defendants, it is ordered that said defendants be, and they are hereby allowed to amend their pleas heretofore filed by interlineation.

And afterwards, to wit, on the 25th day of October, 1889, there was duly filed in said court an answer of defendants, Dalles Military Road Company et al., in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve Walker and the Eastern Oregon Land Company, defendants.

*To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon:*

The answer of The Dalles Military Road Company and of James K. Kelly, President, and C. N. Thornbury, Secretary of said company, to the bill of complaint of the United States, plaintiff.

These defendants now, and at all times hereafter, saving to themselves all and all manner of exceptions or otherwise that may or can be taken to the many errors, uncertainties and imperfections in the said plaintiff's bill contained for answer thereto, or to so much thereof as these defendants are advised it is necessary or material for them to make answer to, answering say:

In answer to paragraph I of the said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph II of the said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph III of said bill, these defendants admit that all the allegations therein contained are true, but they deny that the said act of the Legislative Assembly of the State of Oregon, approved October 14, 1862, had any application to the manner of constructing the wagon road of The Dalles Military Road Company.

In answer to paragraph IV of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph V of the said bill, these defendants, admit that the Governor of Oregon, on the 23rd day of June, 1869, made and executed the certificate copied in the said paragraph; but they say they have no knowledge whatever of any false or fraudulent representations charged in the said paragraph in connection with the procuring of said certificate from the Governor of Oregon. And these defendants believe that neither on the first day of January, 1869, nor on divers days between that day and the 23rd day of June, 1869, nor at any other time, the officers, stockholders, or agents of the Dalles Military Road Company, or any one of them, or any other person or persons acting in their interest, falsely or fraudulently represented to George L. Woods, then the Governor of Oregon, that said road had been constructed as by law required; or that they, the said officers, stockholders, agents and representatives, or any one of them, or any other person or persons, then or at any time knew that any such representations were false, or that the said road had not been constructed according to law. And these defendants believe that no such false or fraudulent representations as are alleged in said paragraph were ever made by any one of said officers, stockholders, agents or representatives of the Dalles Military Road Company, or by any person in its behalf, for the purpose of fraudulently procuring from the said George L. Woods, Governor of Oregon, any certificate declaring that the said road had been constructed in accordance with the said act of Congress approved February 25, 1867, and the said act of the Legislative Assembly of the State of Oregon, approved February 20, 1868. And these

defendants deny that the certificate of George L. Woods, Governor of Oregon, a copy of which is set forth in paragraph five of said bill, was made through any false or fraudulent representations by the officers, stockholders or agents of the Dalles Military Road Company, or by any person or persons in its interest, as alleged in paragraph five of said bill.

In answer to paragraph VI of said bill, these defendants deny the allegations contained therein that the Dalles Military Road Company had not at any time whatsoever constructed, or caused to be constructed, a road upon any line of route located or surveyed by said company or any other corporation, person or persons anywhere within the limits of the grant of land provided in the act of Congress aforesaid, and, on the contrary, they say that the Dalles Military Road Company had, on and prior to the 23rd day of June, 1869, a road upon the said line of route located and surveyed by said company within the limits of said grant of land, completed from Dalles City, on the Columbia river, to Fort Boise on Snake river, and constructed according to the requirements of the act of Congress approved February 25, 1867, with such width, gradation and bridges, as to permit of its regular use as a wagon road.

That the said road was made in the following manner: On June 15, 1863, articles of incorporation were filed in the office of the County Clerk of Wasco County, Oregon, to incorporate "The Dalles and Boise Road Company," for the purpose of constructing a wagon road from Dalles City, in Wasco County, to the Boise mines, in Idaho Territory, with a capital stock of $20,000, divided into four hundred shares of $50 each. Said company was organized by the subscription of the capital stock, and the election of a board of directors, who, soon thereafter, proceeded to construct said road, commencing at a place known as Cross Hollows, on the line of route toward Canyon City. That said company contracted with different persons to make portions of said road between Cross Hollows and Canyon City, by way of Camp Watson; and with other parties to make that portion of it from Canyon City to Snake River. That as early as the fall of 1864, the Dalles and Boise Road Company had made a passable road, so as to enable teams of horses and wagons to go over it and haul freight from Cross Hollows to Canyon City, a distance of about one hundred and forty miles.

The said Dalles and Boise Road Company continued to work on said road and improve its condition until 1866, and expended upon it all the available capital of said company, as well as all the tolls collected from persons passing over said road with teams carrying freight, coaches and other vehicles. That in 1866 the said company became financially embarrassed, and judgments were obtained against it for work and labor done on the said road and supplies furnished, and for provisions for workmen, tools and other necessary supplies.

That on July 1, 1865, Howe & Booth obtained a judgment against said company in the Circuit Court for Wasco County for $445.25 and $73.69 costs.

That on February 5, 1867, Block & Miller obtained a judgment against said company in the County Court of Wasco for $291.79.

That on June 10, 1867, W. G. Colby obtained a judgment in the Circuit Court for Wasco County for $118.32 and costs.

That on October 7, 1867, Wait & Kelly obtained a judgment in the County Court of Wasco County for $182.80 and costs.

That there were divers other small claims against The Dalles and Boise Road Company, which it was unable to pay on account of its insolvent condition.

That on June 6, 1866, by virtue of an execution issued on the judgment of Howe & Booth to the Sheriff of Wasco County, the said Sheriff sold to N. H. Gates, J. R. Robbins and C. S. Miller all that part of The Dalles and Boise road lying in Wasco County, commencing at Cross Hollows and running thence east to the line between Wasco and Grant Counties, a distance of seventy- four (74) miles, more or less, for the sum of six hundred and five dollars ($605), subject to redemption.

That on May 25, 1867, by virtue of an execution issued on the judgment of Block & Miller to the Sheriff of Grant County, the said Sheriff sold to Block & Miller all that portion of The Dalles and Boise road lying in Grant County for three hundred and thirty-six dollars ($336), subject to redemption.

That on January 18, 1868, Kelly & Wait, being lien creditors, redeemed from Sheriff's sale that portion of said road lying in Wasco County sold for six hundred and five dollars ($605), by paying to said Sheriff the sum of eight hundred and

ninety-three dollars ($893) for N. H. Gates, J. R. Robbins and C. S. Miller, the purchasers at Sheriff's sale.

That on the 18th of January, 1868, Victor Trevitt, the assignee of the said judgment of W. G. Colby, being a lien creditor, redeemed from Sheriff's sale that portion of said road lying in Grant County sold to Block & Miller for three hundred and thirty-six dollars ($336) by paying to the Sheriff the sum of three hundred and ninety dollars ($390) for said Block & Miller.

That soon after the said redemptions took place a compromise of all parties interested in said road, whether as purchasers at sheriff's sale or redemptioners, or persons having claims against The Dalles and Boise Road Company, was effected. And it was then agreed among them to reorganize the said company under a new name by increasing the capital stock to one hundred thousand dollars ($100,000.) to be apportioned among the several parties interested, who were to become subscribers to the stock of the organized corporation. That in pursuance of this arrangement, articles were filed on March 9, 1868, incorporating The Dalles Military Road Company with a capital stock with one hundred thousand dollars ($100,000); that on March 10, 1868, the full amount of stock was subscribed and the corporation duly organized.

That the roadbed of The Dalles and Boise Road Company, and all its other property, was then turned over to the newly organized corporation, and The Dalles Military Road Company commenced operations by levying assessments on the stockholders to raise funds to construct and complete its road; that a force of laborers was placed on that part of the road from Cross Hollows to Canyon City during the year 1868, and at the end of the year that portion of the road, consisting of one hundred and forty miles, was completed, so as to be a public highway, constructed with such width, gradation and bridges as to permit of its regular use as a wagon road.

Defendants further say, that in 1864 and 1865 The Dalles and Boise Road Company, did a large amount of work in the construction of that part of its road lying east of Canyon City, and between that place and Snake River, and incurred indebtedness to John P. Booth & Thomas Howe, the contractors, for building the same, which it was unable to pay in full. That

an agreement was then entered into between said corporation and said Booth & Howe, that it would lease to them that part of its road lying between Canyon City and Snake River for —— years, with the privilege of collecting for their own use, all the tolls to be charged for teams hauling freight, stage coaches and other vehicles, horses, mules, oxen, etc., and in consideration of this right and privilege granted to them by the said Dalles and Boise Road Company, the said Booth & Howe agreed to complete that part of said road and keep the same in repair as a wagon road fit for public travel. That this lease continued to remain in force until after the reorganization of that corporation under the name of The Dalles Military Road Company, as hereinbefore set forth.

That in March, 1870, The Dalles Military Road Company entered into a contract with Thomas Howe, one of said lessees, whereby it again leased to him that part of said road lying between Canyon City and Snake River for another period of years, giving him the right and privilege of collecting and receiving for his own use all the tolls to be received thereon. That in consideration thereof, said Howe agreed to construct to and keep in repair that portion of said road as required by law; and further agreed to allow all troops, property and mails of the United States to pass over said road free from tolls or other charges. That said Thomas Howe, the lessee of The Dalles Military Road Company, did open, construct, and keep in repair that portion of said road lying east of Canyon City until long after the time when the Governor of Oregon certified, that said road was constructed as required by the said act of Congress, approved February 25, 1867.

That in March, 1869, The Dalles Military Road Company purchased from one Thomas Gordon the bridge across Des Chutes River, known as the Gordon Bridge, in consideration of fifteen hundred dollars ($1,500 00); that said bridge was about four or five miles above the mouth of said Des Chutes River, and was one of the best, if not the very best, crossings of that stream. That The Dalles Military Road Company made that bridge and the approaches to it a part of its road, and put in good order and condition the said approaches leading to the bridge on both sides of said river, so as to permit of its regular use as a wagon road. That The Dalles Military Road Com-

pany then had a continuous road from Dalles City on the Columbia River, to Fort Boise on Snake River, over which teams of eight or ten horses or mules or five yoke of oxen could and did pass the entire length of said road from The Dalles to Snake River, hauling as much as five tons of freight at a load. That it was constructed with such width, gradation and bridges as to permit of its regular use as a wagon road.

And these defendants deny that when the Governor of Oregon issued the said certificate declaring that said road had been constructed in accordance with the act of Congress, approved February 25, 1867, he knew that it was not true.

And defendants deny the allegation in paragraph VI of the bill of complaint, that George L. Woods, Governor of Oregon, did not make a careful or any examination of any road constructed or owned by The Dalles Military Road Company, and on the contrary these defendants say that said Governor well knew from a partial examination made by him, and by good and sufficient proof from reliable persons examined by him, that the said road was constructed in all respects as required by the act of Congress, approved February 25, 1867.

In answer to paragraph VII of the said bill, these defendants say the said certificate was not procured by The Dalles Military Road Company through or by any false or fraudulent representations made by the said officers, stockholders, agents, or by any other person or persons in order to enable it to falsely or fraudulently obtain possession, or control said lands lying within the limits of said grant; and deny that the acceptance by the Governor of Oregon, of said road belonging to The Dalles Military Road Company was a fraud upon the United States; and on the contrary they say that said road was constructed according to law, and was fairly accepted by the Governor of Oregon, as before stated.

In answer to paragraph VIII of said bill, these defendants say that said road was constructed in whole throughout its entire length, with such width, gradation and bridges as to permit of its regular use as a wagon road and so as to be a public highway, and permit the transportation of property, troops and mails of the United States over the same; and defendant alleges that it was so used when said road was accepted by the

Governor of Oregon, as a road completed according to the act of Congress approved February 25, 1867.

In answer to paragraph IX of said bill, these defendants say that in the construction of said road there was expended by The Dalles Military Road Company, and by its predecessor and assignor, The Dalles and Boise Road Company, and by persons who construct.d that portion of the same between Dalles City and Cross Hollows, and which was purchased from Thomas Gordon, as before stated, in all about eighty thousand dollars ($80,000); and that the lands granted to The Dalles Mi itary Road Company in pursuance of the said act of Congress to aid in the construction of said road were applied to the reimbursement of the moneys so expended in the construction of said road.

In answer to paragraph X of said bill, these defendants say that the lands granted by the said act of Congress were disposed of for the purpose of reimbursing The Dalles Military Road Company and its stockholders for the money expended in the construction of said road, as hereinbefore stated.

In answer to paragraph XI of said bill, these defendants say the allegations therein contained are true.

In answer to paragraph XII of said bill, these defendants say it is true that patents for a portion of the lands included in the grant made by said act of Congress were issued to The Dalles Military Road Company, as alleged in the said bill, and it is believed that the number of acres specified in Exhibit A, attached to the bill, to wit, 126,910.23 acres, is correct But these defendants deny that on the 19th day of June, 1876, or at any other time, the President of the United States or any other officer of the Government of the United States, was deceived, misled or imposed upon by any false or fraudulent certificate, as alleged in the bill, and that he was thereby induced to issue the said patents. And these defendants say the said patents were fairly and properly issued to The Dalles Military Road Company.

In answer to paragraph XIII of said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph XIV of said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph XV of said bill, these defendants say that the same is not a correct statement of the length of said

road. That the same was surveyed after its construction, to wit, between April 22 and May 17, 1869, by David P. Thompson, and the length of said road from the Courthouse in Dalles City to Fort Boise, on Snake River, was three hundred and thirty-one and one-half (331½) miles. This and the time when the said survey was commenced and ended appear by the certificate on the map of survey made by said D. P. Thompson. And this defendant denies that The Dalles Military Road Company inequitably claims the right to have a patent issued for all the lands embraced within said grant not already patented to it; but it does claim that patents should be issued to it for all of said land, because it is justly entitled to such patent.

In answer to paragraph XVI of said bill, these defendants say that neither any one or more of the defendants in this suit had full knowledge, or had any knowledge whatever, that the road provided for by said act of Congress, approved February 25, 1867, had not at any time been constructed as required by the said act of Congress and the act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, so as to be in any sense whatever a public highway; or so that it could be used by the United States or by any of the citizens or residents thereof, as a public highway, or so that the United States could transport its property, troops or mails over the same. And they deny that they, or any of them have full or any knowledge that no grades had been established; that no clearing had been done on any part thereof; no bridges built over any streams on the line thereof, and no cuts made and no turnouts constructed anywhere on the line of road by The Dalles Military Road Company. And they deny that they or any of them had full, or any knowledge that said road was not begun nor completed within five (5) years from the dates of the passage of said act of Congress, approved February 25, 1867, or that it had never been constructed. And they deny that they or any of them well knew, or knew at all that the statements made in the certificate of the Governor of Oregon hereinbefore set forth were false, or that the Governor did not, at any time whatever, examine the road referred to in his certificate, or that the said certificate had been procured by false or fraudulent representations, or that the patent aforesaid was found to be issued upon said false and fraudulently procured certificate

or upon any false certificate. And defendants, further answering, say that said road of The Dalles Military Road Company was constructed over its entire length with such width, gradation and bridges as to permit of its regular use as a wagon road. That soon after its organization, on March 9, 1868, The Dalles Military Road Company entered upon the work of completing portions of the said road which had been partially constructed by its predecessor, The Dalles and Boise Road Company, and constructing other portions of the same so as to facilitate travel thereon. That when the said road was examined and accepted by the Governor of Oregon, as hereinbefore set forth, and certified by him to be constructed in accordance with the act of Congress, approved February 25, 1867, and for more than a year before that time, large wagons loaded with from three to five tons of freight to each wagon, and drawn by three to five pair of horses or mules, and often by five or six yoke of oxen, would go from Dalles City to Canyon City, a distance of two hundred (200) miles. That in making these trips, as these teams frequently did, they would meet other similar teams returning from Canyon City, and pass them without difficulty or any unreasonable detention.

That all the goods, wares and merchandise used and consumed in the mining camps in and around Canyon City and its vicinity, were hauled over the said road from Cross Hollows to Canyon City. That the goods, wares and merchandise used by the farmers and other settlers along the line of said road to Canyon City, and for thirty (30) miles beyond that town, were all transported on said road. That all the supplies used by the U. S. troops stationed at Camp Watson, Camp Harney and Camp Logan, in Grant County (except such as were procured in the vicinity of said military posts), were hauled or packed over a great portion of said military road. That the United States mails were carried on said road from Cross Hollows to Canyon City in passenger coaches drawn by four horses, and made regular trips, sometimes twice and sometimes three times a week, and returned in the same way. And these defendants further say that from and after the time when The Dalles Military Road Company became entitled to the said grant of land by virtue of the act of the Legislative Assembly, approved October 20, 1868, the said road has remained a public highway

for the use of the Government of the United States, free from tolls or other charges upon the transportation of any and all property, troops, mails of the United States and that no tolls were ever collected by The Dalles Military Road Company from the United States since the said 20th day of October, 1868.

And these defendants deny all and all manner of unlawful combination and confederacy with which they are charged in said bill, without this that there is any other matter, cause or thing in the complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants, all which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

JAMES K. KELLY,
C. N. THORNBURY,
DALLES MILITARY ROAD COMPANY,
By James K. Kelly, President of D. M. R. Co.

Attest: C. N. THORNBURY,
Secretary of D. M. R. Co.

JAMES K. KELLY and
A. L FRAZER,
Solicitors for Defendants.

(Seal of D. M. R. Co.)

STATE OF OREGON,
County of Wasco. } ss.

The answer of the defendant, Dalles Military Road Company, was taken this 24th day of October, 1889, before me under the common seal of the said corporation as by their said seal thereto attached appears.

B. S. HUNTINGTON,
Commissioner of the Circuit Court of the United States for the District of Oregon

STATE OF OREGON,
County of Multnomah. } ss.

James K. Kelly, one of the defendants above named, being

duly sworn, on his oath says that the matters and things set forth in the foregoing answer, so far as it relates to his own acts, are true, and so far as it relates to the acts of others he believes them to be true.

JAMES K. KELLY.

Subscribed and sworn to before me this 23d day of October, 1889.

R. H. LAMSON, Clerk.
By R. B. LAMSON, Deputy Clerk.

I hereby accept service of a copy of the foregoing answer, this 25th day of October, 1889.

L. L. MCARTHUR,
United States Attorney.

STATE OF OREGON, )
County of Wasco. ) ss.

C. N. Thornbury, one of the defendants above named, being duly sworn, on his oath says that the matters and things set forth in the foregoing answer, so far as it relates to his own acts, are true, and so far as it relates to the acts of others he believes them to be true.

C. N. THORNBURY.

Subscribed and sworn to before me this 24th day of October, 1889.

B. S. HUNTINGTON,
Commissioner of the Circuit Court of the United States for the District of Oregon.

[Endorsed]: Filed October 25, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Tuesday, the 18th day of February, 1890, the same being the eighty-seventh judicial day of the regular October term of said Court (present, the Honorable George M. Sabin, United States District Judge of Nevada, presiding), the following proceedings were had in said case, to wit :

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

February 18, 1890.

This cause was heard upon the pleas of the defendants filed to the bill of complaint herein, and was argued by Mr. Lewis L. McArthur, United States Attorney, and by Mr James K. Kelly, of counsel for said defendants. On consideration whereof it is now here ordered, adjudged and decreed that said pleas be and the same are hereby sustained, and that the said bill of complaint be and the same is hereby dismissed.

(Signed) GEO. M. SABIN,
Judge.

[Endorsed]: Filed February 18th, 1890.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 18th day of February, 1890, there was duly filed in said court an opinion by the Court in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES OF AMERICA,
*vs.*
THE DALLES MILITARY ROAD COMPANY, ET AL. } No. 1612.

Opinions of the Court, Tuesday, February 18, 1890.

This is a bill in equity, filed by the Attorney-General of the United States, in pursuance of the act of Congress of March 2, 1889 (25 Stat. 850), to procure a decree of forfeiture of all lands granted by the act of Congress of February 25, 1867, to the State of Oregon, to aid in the construction of a military road from Dalles City, on the Columbia, to Fort Boise, on the Snake River, found in 14 Stat. 409, on the ground that the terms of the grant had not been complied with. It also seeks a cancellation of all patents therefor, issued by the United States under the act, and all conveyances to purchasers under

said patents, and under the act, as well as a forfeiture of the lands still unpatented

The bill alleges, in substance, that the road, in aid of which the grant was made, was never constructed in whole, or in part: that through the fraudulent representations of the officers, stockholders and agents of the corporation, the Governor of Oregon was deceived and induced to issue a certificate in pursuance of the provisions of the act, declaring that he had examined the road throughout its entire length, and that it had been constructed and completed in all respects in accordance with the statute; and that, relying upon this certificate, the patents to portions of the lands had been issued by the United States. The State of Orgeon, by an act passed October 20th, 1868, granted the same lands to the defendant, The Dalles Military Road Company, for the same purpose and upon the same terms as prescribed in said act of Congress. (Stat. Or. 1868, 3.) After the road was claimed to have been completed in accordance with the provisions of said several acts, and after the Governor of Oregon had certified to the completion, as provided in the acts, and the road had been accepted, and patents to portions of the lands issued, the said Dalles Military Road Company conveyed the lands for a large consideration, to one Edward Martin, and by sundry mesne conveyances from him, the title became vested in the defendant, the Eastern Oregon Land Company.

The defendants, by leave of the Court first obtained, filed two pleas to the bill, supported by an answer under oath, denying the fraud alleged in the unverified bill, as prescribed by equity rule 32.

The first alleges, "that George L. Woods, then the Governor of Oregon, without any false or fraudulent representations having at any time been made to him by the officers, stockholder or agents, of The Dalles Military Road Company, or any other person or persons, in its or their interest, and without any one or more of them having falsely or fraudulently induced him to certify that the road of said company was constructed in accordance with law; and without any fraud whatever on his part, on January 23, 1869, made a certificate, which certificate is in the words following: "I, George L. Woods, Governor of the State of Oregon, do hereby certify that this

plat or map of The Dalles Military Road has been duly filed in my office by The Dalles Military Road Company, and shows in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an act of Congress, approved February 25, 1867, entitled 'An act granting lands to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise on Snake River, and with the act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, entitled an act donating certain lands to Dalles Military Road Company.' I further certify that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by said above recited acts and that said road is accepted:" that afterwards, on May 31, 1876, The Dalles Military Road Company, for a valuable consideration, to wit, the sum of $125,000, to it paid by Edward Martin, sold and conveyed all the said lands belonging to it to said Martin, his heirs, and assigns, and that by sundry mesne conveyances from said Martin, to the Eastern Oregon Land Company, one of the defendants, the title to all said lands became and now is vested in said defendant, The Eastern Oregon Land Company."

The second plea sets out the same facts, as stated in the first, and the further facts that on December 18, 1869, after making of said certificate by the Governor of the State of Oregon, the commissioner of the general land office withdrew from sale the odd numbered sections within three miles on each side of the said road in favor of The Dalles Military Road Company; that Congress afterwards, on June 18, 1874, passed an act entitled "An act to authorize the issuance of patents for lands granted to the state of Oregon in certain cases," which after reciting that Congress had granted the State of Oregon certain lands to aid in the construction of certain military wagon roads in said state," and that there exists no law providing for issuing formal patents for said lands,"—provided: "That in all cases when the roads in aid of the construction of which said lands were granted, *are shown by the certificate of the Governor of the State of Oregon*, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in

due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public acts, have transferred its interests in said lands to any corporation or corporations, in which case patents shall issue from the general land office to such corporation or corporations, upon payment of the necessary expenses thereof, Provided: That this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for land to which the state is already entitled:" that Edward Martin, a resident of the state of California, placing confidence in the truth of the said certificate of the Governor of Oregon, dated June 23, 1869, that the said road had been duly constructed, according to the requirements of said act of Congress approved February 25, 1867; and placing confidence in the order of the commissioner of the general land office, dated December 28, 1869, withdrawing said lands from sale in favor of The Dalles Military Road Company, and believing that said act of Congress approved June 18, 1874, would be carried into effect by the issue of patents to The Dalles Military Road Company for all said lands, did, on the 31st day of May, 1876, purchase in good faith, for a valuable consideration, to-wit: the sum of $125,000 then paid by the said Martin to said Dalles Military Road Company, except such portions of it as had been previously sold by it; that previous to the time of paying said sum of $125,000, purchase money, and receiving said deed, the said Edward Martin had no notice of any failure on the part of The Dalles Military Road Company to construct and complete the said road in accordance with the requirements of said act of Congress, approved February 25, 1867, and had no reason to believe that the same was not constructed in accordance with the said act of Congress but on the contrary, he was informed and believed that said road had been constructed, with width, gradation and bridges, as to permit of its regular use as a wagon road; that thereupon said Martin became and was the bona fide purchaser of all said lands for a valuable consideration, and they were duly conveyed to him by said corporation; and that by mesne conveyances all of said lands have been conveyed to defendant, the Eastran Oregon Land Company, with like good faith, and for a valu-

able consideration, and they are now held by said defendant, the Eastern Oregon Land Company.

The pleas having been set down for argument by the complainant, for insufficiency, all the material allegation must be taken as true for the purposes of this decision.

In my opinion both pleas are good. The provisions of the act of Congress making the grant are as follows: "That there be and hereby is granted to the State of Oregon, to aid in the construction of a military wagon road * * * alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of the road." Section 1. Section 2 provides "That the lands hereby granted to the said State shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other." Section 5 provides: "*That when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed then a quantity of the land hereby granted, not to exceed thirty sections, may be sold;* and so on from time to time till said road shall be completed." The State of Oregon, by an act passed October 20, 1868, granted the lands so granted to the State to The Dalles Military Road Company, upon the same conditions as in the grant to the State, the act of Congress being recited verbatim in full in the preamble to the act of the State.

The grant to the State by the words "There be and hereby is granted to the State of Oregon" was a grant *in presenti*, passing a present title to the State, to be defeated only by breach of conditions subsequent, as has been repeatedly held by the Supreme Court of the United States. (Schulenberg vs. Harriman, 21 Wal. 44; L. Ry. Co. vs. K. P. R. Co., 92 U. S. 741; M. & C. R. Co. vs. K. P. R. Co., 97 U. S. 491; Wright vs. Roseburg, 121 U. S. 500; Van Wyck vs. Knevals 106 U. S. 360; S. P. R. Co. vs. Orton, 6 Saw. 198; Francoeur vs. Newhouse, 40 Fed. Rep. ——.) The State act in like terms passed the present title, subject only to be defeated by breach of condition subsequent, to The Dalles Military Wagon Road Company. The act of Congress also designated the party, officer or tribunal that should finally determine the question of fact, whether the road had been completed in accordance with the provisions of the statutory grant. Thirty sections were author-

ized to be sold "when the Governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, and so on from time to time until said road is completed." None appears to have been sold until the whole road was certified by the Governor of Oregon, who alone was designated and authorized by the act of Congress to finally determine the matter, to have been fully completed in accordance with the requisites of the Congressional grant. That the certificate was not made on completion of each section of ten miles of the road can make no difference. It is sufficient that it was made at one time, covering the completion of the whole road. The making of the certificate on the completion of each ten miles was authorized for the convenience and benefit of the grantee, and not of the United States. The intent of the Government was to obtain the completion of the whole road. And that being completed its object was fully attained. The authority to determine whether the road was completed was vested solely in the Governor of Oregon, from whose decision there was no appeal. He was the agent of the United States, with full authority to determine this question. And his certificate of completion was to be the evidence, and the only evidence under the provisions of the statutes, that the corporation has fully performed its part of the contract. His decision, therefore, in the absence of any such fraud as would vitiate it is necessarily final and conclusive; and the Government is estopped from denying its finality. This principle was established in Reichert vs. Felps, 6 Wal. 160, and U. S. vs. Speed, 8 Wal. 83. When a special tribunal is authorized to hear and determine certain matters arising in the course of its duties its decisions within the scope of its authority are conclusive. (Johnson vs. Towsley, 13 Wal. 72.) And the same principle has been announced in numerous cases since. The right to a patent once vested is equivalent, as respects the Government dealing with the public lands, to a patent issued. (Stark vs. Sarrs, 6 Wal. 402.) Now in this case the acts of Congress and the State of Oregon, and the certificate of the Governor, are public records; and the certificate of the Governor having been made that the road had been fully completed in all respects as required by the granting act, the title already vested by the grant *in præsenti* became perfected and indefeasible upon the record in the

absence of any such fraud as would defeat it. The verified plea supported by the answer avers that the certificate *was made without fraud.* The plea is therefore sufficient and must be sustained.

The second plea, in addition to the matter stated in the first, alleges, that, the defendants are bona fide purchasers from The Dalles Military Wagon Road Company, without notice of any fraud, or defect in the title, and, that there can be no forfeiture as against them. In Col. Coal Company vs. the United States, a bill was filed to vacate several patents as having been obtained by fraud and perjury, in cases wherein there had in fact, been no actual settlement or improvement on the land, although the evidence showed that there had been, it was held that the defense of a bona fide purchaser, without notice, is perfect. 123 United States, 307. It was also held that the burden of satisfactorily showing the fraud, is on the complainant. So, in United States vs. Minor, 12 Sawyer, 164, it was held that a purchaser of land, in good faith, for a valuable consideration, from a patentee of the United States, without actual notice of any fraud affecting the bill is entitled to rely upon the record; and that a patent if valid upon its face, will not be vacated as to him, for matters *dehors the record* of which he has no knowledge. Said the Court: "The patent, which is the final record of the title (Beard vs. Federy, 3 Wall. 491–92), was regular and valid on its face. The proper department of the Government had examined the case on the evidence presented, adjudged the right to be in Minor, and issued the patent accordingly in due form. The patent could not be assailed by matter, *dehors* the record and resting in parol. Innocent parties were entitled to rely on the record." Ib. 167. These observations are equally applicable to the present case. The two Statutes, one of the United States and the other of Oregon, the certificate of the Governor of Oregon, made in pursuance of the first named statue, the act of 1874, authorizing the issue of the patents upon the Governor's certificate as to the unpatented lands, and these, together with the withdrawal of the lands from sale by the secretary and the patents so issued, as to all the lands patented, constitute the record and upon this record purchasers were entitled to rely. The claim that purchasers could not

rely upon this record, but that they must go over the road, and, at their peril, ascertain for themselves whether it had been completed in all parts in pursuance of the provisions of the statutory grant, is preposterous. The record shows upon its face that all conditions have been performed; that this has been so adjudged by the officer authorized to determine the fact and the correctness of his determination is recognized by Congress in the act of 1874, directing patents to issue upon the certificates, and on that record the parties were entitled to rely. While innocent purchasers are thus protected upon undisputed equitable principles and authority, their rights are also expressly recognized and affirmed by the statute itself under which this suit is brought, which provides that the courts shall determine the questions, which they are authorized to consider in a manner "saving and perserving the rights of bona fide purchasers of either of said grants, or of any portion of said grants, for a valuable consideration." 25 Stat., U. S. 851. Thus the statute itself recognizes the rights of innocent purchasers, if they had been otherwise doubtful. It is plain, therefore, that the second plea is sufficient, and must be sustained.

The remaining question to be considered, and the only one presented, upon which there is any room for doubt, is whether complainants should be permitted to reply to the pleas, or whether the bill should be dismissed? Upon the whole, after careful consideration, I think the bill should be dismissed. I think it in the highest degree probable that such would be the final result, whichever course is pursued. If so, the expense and annoyance of a long litigation would be fruitless.

The Governor of Oregon upon whom alone was devolved the the jurisdiction and duty to finally determine the fact as to the completion of the road, made his certificate on June 23, 1869, and, thereby, furnished record evidence of the complete and proper performance of all the conditions of the statutory grant, and that the title to lands granted had become perfect and indefeasible. He certifies that he makes the certificate after and upon a careful personal examination of the road since its completion. Certainly the public, and subsequent purchasers, were entitled to rely upon this careful, positive certificate of the

party authorized, chosen and designated to determine and certify the fact of completion.

Five years afterwards, on June 18, 1874, without any proceedings having been taken to declare a forfeiture of the grant for breach of condition subsequent, and without any complaint appearing to have been made, that said certificate of the Governor was false, or that said road had not been fully completed, in all particulars, as was required by the granting act, and while the Government must have been all the time using the road for its various purposes, designated in the act, Congress passed another "act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," wherein, after reciting that "certain lands have heretofore by acts of Congress been granted to the State of Oregon to aid in the construction of certain military wagon roads in said State," it was provided "that *in all cases* when the roads, in aid of the construction of which said lands were granted, *are shown by the certificate of the Governor of the State of Oregon, as in said act provided, to have been constructed and completed*, patents for said lands *shall issue in due form* to the State of Oregon as fast as the same shall, under said grants be selected and certified, *unless the State of Oregon shall, by public act, have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations*, upon the payment of the necessary expenses thereof: provided that this shall not be construed to revive any land grant already expired, nor create any new rights of any kind: except to provide for issuing patents for lands to which the State is already entitled." (18 Stat. 80.) The State in this case had so transferred its interest to The Dalles Military Wagon Road Company. By this act Congress directed that patents shall issue, "*in all cases*," not *when the roads have actually in fact been completed as required by law, but in all cases*, "*when the roads* * * * *are shown by the certificate of the Governor of the State of Oregon, as in said acts provided, to have been constructed and completed.*" Now, in this case, after waiting five years after the certificate of completion, made upon personal examination by the Governor, having all the means of ascertaining whether it was false or true, Congress positively, in ef-

fect, *affirmed its truth* by this provision of the act. It determined the fact of the performance of the conditions of the grant by directing in terms, patents to be issued "*in all cases*" *when the certificate had been issued.* The closing paragraph in the proviso would operate only upon any lapsed grant if any there was, by failure to complete in the required time, or when the work was not all completed, and when no certificate had been issued, or when certificates for only a part had been made But it necessarily recognizes that "in all cases" when the certificate of the Governor had been issued, the conditions have been performed, and the grantee has become entitled to a patent. The statute in effect, confirms, by Legislative act, the judicial act of the Governor, in ascertaining and certifying the completion of the work. I know of no case, where a Legislative grant, or act, has been investigated, and set aside, by the Courts, on the ground that its passage had been secured by imposition or fraud, upon the Legislative body passing the law. In Tameling vs. United States, it was held that the action of Congress confirming a private land claim in New Mexico is not subject to judicial review.

In the present case, the road must necessarily, have been used by the government during these many years for those purposes, which were of so urgent a character as to induce Congress to make the grant in aid ofits construction, or else the failure to complete it, in such manner, that it could be so used, must inevitably, have come to the knowledge of the government and Congress. With this knowledge, necessarily had, the act of 1874 was deliberately passed.

Congress exercised its discretion upon such information as it had, in requiring the issue of the patents upon these certificates of the Governor, and that is the end of the matter. It is a legislative recognition and affirmation, of the correctness of the certificate of the Governor of Oregon. See also Ryan vs Carter 93 U. S., 78,

It seems to me, also, that the cause of suit ought to be regarded as stale, so as to render it inequitable under the circumstances of the case, to prosecute it now within the established principals or equity jurisprudence. Fifteen years elapsed after the affirmative and confirmatory action of Congress in directing in mandatory language, the issue of the patents to lands "in all

cases" when the certificate of the governor had been made, and twenty years after the date of the certificate now claimed to have been fraudulently issued, before the passage of the act authorizing the bringing of this suit. It is a well known historical fact familiar to every citizen of Oregon that the governor himself who made the certificate in this case and the governors who made them in the following case are both dead, as well, doubtless, as many of the other parties to the transactions. At this day it would, doubtless, be difficult to establish by sufficient affirmative testimony any actual fraud, if any there was. Although statutes of limitations do not run against the United States, and would not be available in an action of law, it seems to me that the case is a proper one for the application of the principle that it would be inequitable to enforce a stale claim, and that a court of equity would not on that ground now declare a forfeiture.

Had the land grant been made for the same purposes and upon the same conditions by a private citizen, and the subsequent action both of the grantee and grantor been precisely the same as in this case, there can be little doubt, I apprehend, that a court of equity, in view of all the circumstances, would, at this late day, refuse to decree a forfeiture and to restore the lands to the grantor for breach of the conditions subsequent, on the ground that it would be inequitable to enforce so stale a claim against parties who had subsequently purchased, in full view of the affirmative public action, as well as the non-action of the grantor, and thereby had good reason to suppose that all the conditions of the grant, whether in fact well performed or not, had been satisfactorily performed. Bowman vs Wathen, 1 How., 189; Platt vs Vatter, 9 Pet., 416; Badger vs Badger, 2 Wal. 93; Sullivan vs Portland R. Co., 94 U. S., 811; Clarke vs Boomar's, Ex. 18 Wal., 409.

Whatever is inequitable as between man and man in their dealings between each other should also be deemed inequitable between the United States and those with whom they condescend to deal under like circumstances, and I take it that the same decree is proper in this case that would have been proper had a private party been the grantor, and had he by both his positive affirmative action and his non-action for so long a time given purchasers from his grantee so good reason to believe

that he was fully satisfied with the performance of the conditions of the grant.

In my judgment all subsequent purchasers were entitled to rely implicitly upon the certificate of the Governor, who was alone authorized to determine the fact of the completion of the road, and especially after its confirmation by Congress in the act peremptorily requiring patents to issue in all cases where certificates had been in fact issued. *If there were suspicious circumstances before the passage of this act which purchasers might be called upon to notice, the passage of this act assured them that Congress had informed itself of the action of the State and its grantees under it, and was satisfied as to the full performance of the work; or at least, if it found any defects or shortcomings, that they were waived and all the work accepted* Martin purchased of The Dalles Company, two years after the passage of the act of 1874, and was therefore a subsequent purchaser. Subsequent purchasers certainly had a right to rely upon the action had from time to time by Congress and its agents duly authorized, and the public record of it so made. It is now estopped from alleging the nonfulfillment of the statutory conditions of the grant.

Let the bill be dismissed.

SAWYER,
Circuit Judge.

[Endorsed]: Filed Feby. 18 1890.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Friday, the 21st day of February, 1890, the same being the ninetieth judicial day of the regular October term of said Court (present, the Honorable George M. Sabin, United States District Judge of Nevada, presiding), the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

February 21, 1890.

Now, at this day, on motion of Mr. F. P. Mays, United States Attorney, it is ordered that an appeal in this cause to

the Supreme Court of the United States be and the same is hereby allowed.

And afterwards, to wit. on the 8th day of June, 1891, there was duly filed in said Court, a mandate from United States States Supreme Court in words and figures as follows, to wit:

UNITED STATES OF AMERICA—ss.

The President of the United States of America
To the Honorable the Judges of the
Circuit Court of the United States
for the District of Oregon, greeting:

(U. S. Seal of Supreme Court.)

Whereas, lately in the Circuit Court of the United States for the District of Oregon, before you or some of you, in a cause between the United States, complainant, and The Dalles Military Road Company, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants, No. 1612, wherein the decree of the said Circuit Court, entered in said cause on the 18th day of February, A. D. 1890, is in the following words, viz: "This cause was heard upon the pleas of the defendants filed to the bill of complaint herein, and was argued by Mr. Lewis L. McArthur, United States Attorney, and by Mr. James K. Kelly, of counsel for said defendants; on consideration whereof, it is now here ordered, adjudged and decreed that said pleas be and the same are hereby sustained, and that the said bill of complaint be and the same is hereby dismissed.

GEO. M. SABIN,
Judge."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal aggreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety, the said

cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be, and the same is hereby reversed, in so far as it dismisses the bill.

And it is further ordered, that this cause be, and the same is hereby remanded to the said Circuit Court with a direction to allow the plaintiff to reply to and join issue on the pleas.

May 25, 1891.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed]: Filed June 8, 1891.

R. H. LAMSON,

Clerk.

And afterwards, to wit: on Wednesday, the 10th day of June, 1891, the same being the 4th judicial day of the regular April term of said Court: Present, the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

| | |
|---|---|
| THE UNITED STATES<br>*vs.*<br>THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company. | No. 1612. |

June 10, 1891.

Now, at this day, comes the plaintiff in the above entitled cause by Mr. Franklin P. Mays, United States Attorney, and the defendants by Mr. C. E. S. Wood, of counsel; and thereupon said defendants present to the Court the mandate of the Supreme Court of the United States in this cause, now on file, in the words and figures following, to wit:

"UNITED STATES OF AMERICA—ss.

(Seal of U. S. Supreme Court.)

The President of the United States of America to the Honorable the judges of the Circuit Court of the United States for the District of Oregon, greeting:

Whereas, lately in the Circuit Court of the United States for the District of Oregon, before you, or some of you, in a cause between the United States, complainant, and the Dalles Military Road Company, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants, No. 1612, wherein the decree of the said Circuit Court, entered in said cause on the 18th day of February, A. D. 1890, is in the following words, viz: 'This cause was heard upon the pleas of the defendants filed to the bill of complaint herein, and was argued by Mr. Lewis L. McArthur, United States Attorney, and by Mr. James K. Kelly, of counsel for said defendants; on consideration whereof, it is now here ordered, adjudged and decreed that said pleas be and the same are hereby sustained, and that said bill of complaint be and the same is hereby dismissed.

GEO. M. SABIN,

Judge.'

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act

of Congress, in such case made and provided, fully and at large appears. And, whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel. On consideration whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause, be and the same is hereby reversed, in so far as it dismisses the bill. And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court, with a direction to allow the plaintiff to reply to, and join issue on, the pleas.

May 25, 1891.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. MCKENNEY

Clerk of the Supreme Court of the United States.

And moves the court that a decree be entered in this case in pursuance thereof: It is thererefore adjudged and decreed that the decree of this court herein be, and the same is hereby reversed and set aside, in so far as it dismisses the bill of complaint herein, and that said plaintiff be and it is hereby allowed three days from this date in which to reply to the pleas of the defendants.

(Signed) DEADY, J.

[Endorsed]: Filed June 10, 1891.

R. H. LAMSON, Clerk.

And afterwards, to-wit, on the 13th day of June, 1891, there was duly filed in said court a replication in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company, defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Dirtrict of Oregon:

The replication of the United States, plaintiff, to the answer and pleas of the above named defendants.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer and pleas, for replication thereunto sayeth, that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer and pleas of the said deiendants are uncertain, untrue and insufficient to be replied unto by this repliant without this, that, any other matter or thing whatsoever in the said answer and pleas contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

W. H. H. MILLER,
Attorney General.

FRANKLIN P. MAYS,
U. S. Attorney for Oregon.

CHARLES E. LOCKWOOD,
Asssistant U. S. Attorney for Oregon.

W. CARY JOHNSON,
Special Assistant U. S. Attorney.

Due service of the within replication by certified copy, as provided by law, is hereby admitted at Portland, Oregon, June 13, 1891.

A. L. FRASER,
Solicitor for defendants.

[Endorsed]: Filed June 13, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Friday, the 31st day of July, 1891, the same being the sixty-second judicial day of the regular April term of said court (present the Honorable Matthew P. Deady, United States District Judge, presiding), the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

July 31, 1891

Now, at this day, on motion of Mr. Franklin P. Mays, United States Attorney, it is ordered that Mr. Albert H. Tanner be and he is hereby allowed to enter his appearance as counsel for the plaintiff herein.

And afterwards, to wit, on the 31st day of July, 1891, there was duly filed in said court an appearance of plaintiff in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin et al.

To the Clerk of the above entitled Court:

You will please enter my appearance as solicitor in the above entitled cause for the complainant, having been appointed assistant attorney herein by the Attorney-General.

A. H. TANNER.

[Endorsed]: Filed and entered October 31, 1891.

R. H. LAMSON, Clerk.

By G. H. MARSH, Deputy.

And afterwards, to wit, on the 5th day of August, 1891, there was duly filed in said court a notice to take testimony in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N Thornbury, Eleanor Martin, et al., defendants.

To James K. Kelly and Arthur L. Frazer, solicitors for defendants:

You will please take notice, that the complainant desires the evidence to be adduced in this cause to be taken orally before George H. Durham, Examiner, under the sixty-seventh rule of the Supreme Court as amended.

F. P. MAYS,
United States District Attorney, and
A. H. TANNER,
Solicitors for Complainant.

Due service of the foregoing notice is hereby admitted and accepted at Portland, Oregon, this 4th day of August, 1891.

A. L. FRAZER,
Of Solicitors for Defendant.

[Endorsed]: Filed August 5, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 7th day of August, 1891, there was duly filed in said Court a notice, motion and affidavit for order to take testimony, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, Complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, et al., defendants.

## NOTICE.

To James K. Kelly and Arthur L. Frazer:

You will please take notice that the complainant will, on Wednesday, the 12th day of August, 1891, at 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard move the Court to enlarge and apportion the time which shall be allowed the parties hereto respectively in which to take testimony herein, as provided by the 67th Rule of the Supreme Court as amended.

F. P. MAYS,
U. S. District Attorney, and

A. H. TANNER,
Solicitors for Complainant.

THE UNITED STATES, Complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, et al., Defendants.

## MOTION.

Now comes the above named complainant and moves the Court to enlarge and extend and apportion the time which shall be allowed the parties hereto respectively in which to take testimony herein as provided by the 67th Rule of the Supreme Court as amended, so as to allow the plaintiff 30 days in which to take its testimony after the defendants have put in their testimony in support of the pleas and answers herein filed.

This motion is based upon the affidavit of Albert H. Tanner, hereto attached, and marked Exhibit "A," and the pleadings and papers on file herein.

F. P. MAYS,
U. S. District Attorney, and

A. H. TANNER,
Solicitors for Complainant.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, Complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, et al., Defendants.

## AFFIDAVIT.

UNITED STATES OF AMERICA, District of Oregon, County of Multnomah. } ss.

I, Albert H. Tanner, being first duly sworn, say: That I am one of the solicitors for the complainant in the above entitled cause; That the reply to the pleas and answers herein filed was filed in this Court on the 13th day of June, 1890, and this cause put at issue upon the said pleas That consequently but little more than thirty days remains in which to take the testimony herein under the 67th Rule of the Supreme Court, allowing three months to the taking of the testimony in any cause after the same is put at issue.

That no testimony has been taken as yet in their behalf by either of the parties to this suit.

That the time remaining, to wit, about thirty days, is insufficient, and that it will be impossible for the complainant to take its testimony herein in support of the bill and issues made upon the said pleas within that time.

That upon the question of showing the fraud charged in the bill and notice thereof to the defendants it will be necessary for the complainant to take the testimony of a large number of witnesses residing in remote parts of the State along the line of the road mentioned in the bill, and to secure the attendance of said witnesses in Portland for examination in this cause.

That many of said witnesses reside from 400 to 500 miles from the City of Portland, and that it will require a considerable time to subpena said witnesses and to secure their attendance and take their testimony herein.

That I believe the complainant ought to have at least sixty days after the defendants have put in their testimony in sup-

port of their plea to take testimony in answer thereto and in support of the bill.

That there are two other cases of the same nature to this now pending in this court, which are put at issue at the same time, and in which the same issues are made, and upon which it will be necessary to take a large amount of testimony from a large number of witnesses residing in other and different portions of the State, some of them 400, 500 or 600 miles from the City of Portland, where said testimony is to be taken, and that in order to take the testimony in each of said cases, which the complainant proposes to take in support of the fraud charged in the bill, and to show notice thereof to the defendants, the same will necessarily have to be taken in each of said cases separately; and as there is but one examiner before whom the testimony can be taken, a further and longer time should be allowed in said other cases than in the one in which the testimony is first taken.

That I verily believe that it will be impossible for the complainant to take its testimony in said cases within the time remaining of the ninety days since the cases were put at issue.

That thirty days should be allowed in the first case to the complainant to take its testimony after the defendants have put in theirs, sixty days in the second and ninety days in the third, and that a shorter time than that allowed to the complainant in each of said suits will greatly embarrass it, and render it impossible to get in all the testimony it desires to introduce in support of the bill herein and upon the the issues made upon the said pleas and answers herein filed.

A. H. TANNER.

Subscribed and sworn to before me this 6th day of August, 1891.

(SEAL) H. G. PLATT,
Notary Public for Oregon.

Due service of the within and foregoing notice, motion and affidavit is hereby admitted at Portland, Oregon, this 6th day of August, 1891.

A. L. FRAZER,
Of Solicitors for Defendants.

[Endorsed]: Filed August 7, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Saturday, the 8th day of August, 1891, the same being the 66th judicial day of the regular April term of said court, present, the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY, *et al.* } No. 1612.

August 8, 1891.

Now, at this day, this cause comes on to be heard upon the application of the plaintiff for an order fixing the time in which to take testimony herein, and was argued by Mr. Franklin P. Mays and Mr. A. H. Tanner, of counsel for the plaintiff, and by Mr. A. L. Frazer, of counsel for the defendants; on consideration whereof, it is ordered that said defendants have thirty days from this date in which to take their testimony; that said plaintiff have thirty days thereafter in which to take its testimony, and that said defendants have ten days thereafter to take their testimony in rebuttal.

And afterwards, to wit, on Wednesday, the 26th day of August, 1891, the same being the 75th judicial day of the regular April term of said court, present, The Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY, *et al.*, } No. 1612.

August 26, 1891.

Now, at this day, comes the defendants by Mr. Arthur L. Frazer, of counsel, and said defendants move the Court for an

order that a *dedimus potestatem* issue out of this Court, directed to some qualified person at San Francisco, in the State of California, authorizing and empowering him as a Commissioner of this Court to take and transmit to this Court the testimony of D. V. B. Henarie, James Phelan and David P. Belknap, witnesses on the part of said defendants, to be used on the trial of this cause, and it appearing necessary to prevent a failure of justice, that the testimony of said witnesses should be taken on commission out of this court.

It is ordered that the clerk of this Court issue a commission to L. S. B. Sawyer, residing at San Francisco, aforesaid, authorizing and empowering him, as a Commissioner of this Court, to take and transmit to this Court the testimony of the above named witnesses in answer to interrogatories direct and cross, to be prepared by the parties, and submitted to the clerk in case they cannot agree thereto.

(Signed) MATTHEW P. DEADY.
U. S. District Judge, Oregon.

[Endorsed]: Filed August 26, 1891.
R. H. LAMSON, Clerk.

And afterwards, to wit, on Wednesday, the 11th day of November, 1891, the same being the 20th judicial day of the regular October term of said Court, present, the Honorable Matthew P. Deady, United States District Judge, presiding the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

November 11, 1891.

Now, at this day, on motion of Mr. A. L. Frazer, of counsel for the defendants, Eleanor Martin, P. J. Martin, D. V. B. Henarie and the Eastern Oregon Land Company, it is ordered that said defendants be and they are hereby allowed to file amended pleas and an amended answer herein.

And afterwards, to wit, on the 11th day of November, 1891,

there was duly filed in said court an amended plea of defendants Henarie et al., in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants.

The joint and several amended plea and accompanying amended answer of the defendants D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company, defendants, to the bill of complaint of the United States complainant. These defendants, by protestation not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill, or to so much and such part of the said bill as prays that the land granted to the State of Oregon by the act of Congress of date February 20, 1867, and now owned by these defendants, be decreed forfeited to the United States, says:

I.

That George L. Woods, then Governor of Oregon, without any false or fraudulent representations having at any time been made to him by the officers, stockholders or agents of The Dalles Military Road Company, or any other person or persons in its or their interest, and without any one or more of them having falsely or fraudulently induced him to certify that the road of said company was constructed in accordance with law, on the 23d day of June, 1869, issued in favor of said company a certificate in the following words and figures, to wit.

EXECUTIVE OFFICE,
Salem, Oregon, June 23, 1869.

I, George L. Wood, Governor of the State of Oregon, do hereby certify that this plat or map of The Dalles Military Road has been duly filed in my office by The Dalles Military Road Company, and shows, in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an act of Congress approved February 25, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on Snake River," and with the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, entitled "An act donating certain lands to Dalles Military Road Company." I further certify, that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by the said above recited acts, and that said road is accepted.

In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon.

Done at Salem, Oregon, June 23, 1869.

GEO. L. WOODS.

Attest: SAMUEL E. MAY,
(SEAL) Secretary of State.

That on the 31st day of May, 1876, The Dalles Military Road Company, for a valuable consideration, to wit, the sum of $125,000, to it paid by Edward Martin, of San Francisco, in the State of California, sold and conveyed all the said lands belonging to it to said Edward Martin, his heirs and assigns.

That by sundry mesne conveyances from the said Edward Martin to the Eastern Oregon Land Company, one of these defendants, the title to said lands became and now is vested in said Eastern Oregon Land Company.

II.

And for a second amended plea filed by leave of the Court, these defendants say:

That on June 23, 1869, the Governor of Oregon certified

that the plat or map of The Dalles Military Road had been duly filed in the executive office; that it showed the location of the line of route upon which said road was constructed in accordance with the requirements of the act of Congress, approved February 25, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on Snake River," and with the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, entitled "An act donating certain land to The Dalles Military Road Company."

And the Governor of Oregon then further certified that he had made a careful examination of said road since its completion, and that the same was built in all respects as required by the said above recited acts, and was then accepted, as will more fully appear by the fifth (5) paragraph of the said bill of complaint.

That on December 18th, 1869, the Commissioner of the General Land Office withdrew from sale the odd numbered sections within three milles from each side of the said road in favor of The Dalles Military Road Company.

That Congress by an act approved June 19th, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands had been granted by Congress to the State of Oregon to aid in the construction of certain military wagon roads, and the certificate of the Governor of Oregon should show that any such road had been constructed and completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands, unless the State should by public act have transferred its interest in such lands to any corporation, in which case the said lands were to be patented to such corporation, as will more fully appear by the eleventh (11) paragraph of the bill of complaint.

That Edward Martin, then a resident of San Francisco, in the State of California, placing confidence of the truth of the certificate of the Governor of the State of Oregon dated June 23d, 1869, that the said road had been duly constructed according to the requirements of the said act of Congress, approved February 25th, 1867: and also placing confidence in the order of the

Commissioner of the General Land Office, dated December 18th, 1869, withdrawing the said lands from sale in favor of The Dalles Military Road Company: and also believing that the said act of Congress, approved June 18th, 1874, would be carried into effect by issuance of patents to The Dalles Military Road Company for all said lands, did, on the 31st day of May, 1876, purchase in good faith for a valuable consideration, to wit, the sum of $125,000, then paid by said Edward Martin to said Dalles Military Road Company, all the lands embraced in the grant to said company, except such portions thereof as had previously been sold by it. That previous to the time of paying the sum of $125,000 purchase money, and receiving said deed, the said Edward Martin had no notice of any failure on the part of The Dalles Military Road Company to construct and complete said road, in accordance with the requirements of said act of Congress, approved February 25th, 1867, and he had no reason to believe that the same was not constructed in accordance with the said act of Congress, but, on the contrary he was informed and believed that said road had been constructed with such width, gradation and bridges as to permit of its regular use as a wagon road.

That, thereupon, the said Edward Martin became and was the bona fide purchaser, for a valuable consideration, of all said lands then owned by The Dalles Military Road Company, which were then conveyed to him by said corporation, as will more fully appear by its deed, a copy of which is attached to the bill of complaint, marked Exhibit "B," and dated May 31st, 1876.

That the said Edward Martin afterwards, to wit, on January 31st, 1877, executed and delivered to D. V. B. Henarie, one of the defendants, a deed of trust, wherein he acknowledged that said D. V. B. Henarie was the owner of the undivided fourth of all the lands mentioned and described in said deed of The Dalles Military Road Company, to said Edward Martin, and that he held the same in trust for said D. V. B. Henarie, which deed of trust was recorded in Wasco County, State of Oregon, on May 7, 1884, in Vol. A, page 265, in Miscellaneous Records; also in Baker County, Oregon, on May 10th, 1884, in Vol. 2, page 317, in Record of Leases and Agreements, and also in Grant

County, Oregon, on May 27th, 1884, in Book A, page 584, of Miscellaneous Records.

That when said Edward Martin purchased said lands on May 31st, 1876, as hereinbefore stated, said D. V. B. Henarie paid the one-fourth of the consideration for the same, to-wit, one-fourth of $125,000.

That he made said purchase in good faith, relying upon the certificate of the Governor of Oregon that said road had been constructed according to the act of Congress, approved February 25th, 1867, and also relying upon the act of Congress, approved June, 18, 1874, that patents in due form of law would be issued to The Dalles Military Road Company for said lands, that he had no notice at the time he paid one-fourth of said purchase money, and when said deed was executed and delivered to said Edward Martin, that said road had not been constructed and completed by The Dalles Military Road Company, as required by said act of Congress of February 25th, 1867.

That afterwards, to wit, on the 12th day of May, 1880, the said Edward Martin died intestate in the City of San Francisco, in the State of California, leaving a widow, the defendant, Eleanor Martin, and leaving as his heirs-at-law, Thomas S. Martin, Edward Martin and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors.

That in March, 1882, the interest of said minors in said lands was sold at a guardian's sale by order of the County Court of Wasco County, Oregon, at which sale the interest of said minors in said lands was purchased in good faith for a valuable consideration by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear by Exhibit "C," attached to the bill of complaint. That on August 3d, 1882, the said James Phelan sold his interest in said lands to Peter Donahue, as will more fully appear by Exhibit "D," attached to the bill of complaint.

That on the 11th day of August, 1884, all the heirs of said Edward Martin, and all persons who held an interest by purchase in said lands, to wit, P. J. Martin, Eleanor Martin, D. V. B. Henarie, Peter Donahue, Edward Martin, James V. Martin,

Thomas S. Martin, Genevieve E. Walker and Joseph W. Winans sold, and by deed conveyed all their interest in the said lands and land granted to the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California, having its office in the City of San Francisco, in the State of California, as will more fully appear by Exhibit "E," attached to the bill of complaint.

That the Eastern Oregon Land Company now holds the legal title to all the said lands granted to The Dalles Military Road Company, except such as have heretofore been sold and conveyed by The Dalles Military Road Company and its grantees and the said Eastern Oregon Land Company.

All which matters and things these defendants do aver to be true, and they plead the said matters in bar to the plaintiff's bill of complaint, and pray the judgment of this Honorable Court whether they ought to be required to make any other or further answer to said bill, and pray to be hence dismissed with their costs and charges in that behalf, most wrongfully sustained.

JAMES K. KELLY and
A. L. FRAZER,
Solicitors for Defendants.

UNITED STATES OF AMERICA,
District of Oregon. } ss.

I, A. L. Frazer, of counsel for the above named defendants, do hereby certify that in my opinion the foregoing amended plea of said defendants is well founded in point of law.

A. L. FRAZER,
of Solicitors for Desendants.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

We, D. V. B. Henarie, Eleanor Martin, P. J. Martin and D. V. B. Henarie, President Eastern Oregon Land Company, being duly sworn according to law, do say that we are defendants in

the above entitled suit, that the foregoing plea is not interposed for delay, and that it is true in point of fact.

D. V. B. HENARIE,
ELEANOR MARTIN.
P. J. MARTIN.
D. V. B. HENARIE,
President Eastern Oregon
Land Company.

Sworn to before me this 9th day of November, 1891.

L. S. B. SAWYER,
Clerk and Commissioner United
(SEAL) States Circuit Court, Northern
District California.

STATE OF OREGON,
County of Multnomah. } ss.

Due service of the within amended plea is hereby accepted at Portland, Oregon, this 11th day of November, 1891, by receiving a copy thereof, duly certified to as such by A. L. Frazer, counsel for defendants.

[Endorsed]: Filed November 11, 1891.
R. H. LAMSON, Clerk.

And afterwards, to-wit, on the 11th day of November, 1891, there was duly filed in said court an amended answer of defendants Henarie, et al., in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevive E. Walker and The Eastern Oregon Land Company, defendants.

To the Honorable the Judges of the Circuit Court of the United States, for the District of Oregon:

The amended answer of Eleanor Martin, P. J. Martin, and D. V. B. Henarie, and The Eastern Oregon Land Company, defendants in the above entitled suit to the bill of complaint of the United States, complainant, accompanying the pleas of these defendants, and fortifying the same and not waiving the pleas.

These defendants, now and at all times hereafter saving to themselves all and all manner of exceptions or otherwise that may or can be taken to the many errors, uncertainties and imperfections in the said plaintiff's bill contained, for answer thereto, or to so much thereof as these defendants are advised it is necessary or material to them to make answer to, answering, say:

In answer to paragraph I of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph II of the said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph III of the said bill, these defendants admit that all the allegations therein contained are true; but they deny that the said act of the legislative assembly of the State of Oregon, approved October 14th, 1862, had any application to the manner of constructing the wagon road of The Dalles Military Road Company.

In answer to paragraph IV of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph V of the said bill, these defendants admit that the Governor of Oregon, on the 23d day of June, 1869, made and executed the certificate copied in the said paragraph, but they say that they have no knowledge or information or notice that either on the first day of January, 1869, or on divers days between that day and the 23d day of June, 1869, or at any other time, the officers stockholders or agents of The Dalles Military Road Company, or any one of them, or any other person or persons acting in their interest, or in the interest of the said Company, falsely or fraudulently represented to George L. Woods, then the Governor of Oregon, or to any other person that said road had been constructed as by law required, or that the said officers, stockholders, agents or representatives, or any other person aforesaid, or any one or more of them, then or there, or at any time, knew that any such representations were false or that the said road had not been con-

structed according to law; and they had no knowledge or information or notice thereof at the time of the purchase by them of the land in said bill of complaint mentioned, or at the time of the payment of the purchase money and delivery of the deeds therefor.

And these defendants allege that they neither have nor at any time had any knowledge, information or notice that any such false or fraudulent representations, as alleged in the said bill, were ever made by any of the said officers, stokholders, agents or representatives of The Dalles Military Road Company, or any person or persons in its behalf, for the purpose of fraudulently procuring from the said George L. Woods, Governor of Oregon, any certificate declaring that the said road had been constructed in accordance with the act of Congress approved February 25, 1867, and the act of the Legislative Assembly of the State of Oregon approved February 20, 1868, and these defendants say that they neither have now nor at the time they purchased said land, or paid the purchase price therefor, or at any time, had any knowledge, information or notice that the certificate of George L. Woods, Governor of Oregon, a copy of which is set forth in paragraph V of said bill, made or issued through any false or fraudulent representations by the officers, stockholders or agents of The Dalles Military Road Company, or of any person or persons in its interest, as alleged in said paragraph V of said bill.

In answer to paragraph VI of said bill, these defendants say they neither have, nor at the time of their purchase of said land, nor at any time had any knowledge, information or notice that The Dalles Military Road Company have not at any time whatsoever constructed or caused to be constructed a road upon the line of route located and surveyed by said company within the limits of the grant of land provided for in act of Congress aforesaid, or at all, or that this, the said George L. Woods, Governor aforesaid, then or there well knew, or that it was not or is not true that the said Governor made the careful examination of the road constructed and owned by The Dalles Military Road Company, or that said road was not constructed and completed in all respects as required by said act of Congress.

In answer to paragraph VII of said bill of complaint, these

defendants say that they have not and had not at the time of the purchase by them of the lands in the bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor, any knowledge, information or notice that said certificate was procured by The Dalles Military Road Company by or through any false or fraudulent representations by the officers, stockholders, agents or representatives aforesaid, or by any person or persons, in order to enable it falsely or fraudulently to obtain possession or control of the lands lying within the limits of the grant of land provided for in the act of Congress aforesaid, or that the acceptance of said road by the Governor aforesaid was a fraud upon the United States of America, or at all.

In answer to paragraph VIII of the said bill, these defendants say that they have not, and had not at the time of the purchase by them of the lands in the bill of complaint mentioned, or at any time, any knowledge, information or notice that the said road was not built, graded, bridged, cleared and constructed in whole throughout its entire length so as to be a public highway, or that said road was not constructed and completed so as to permit of the transportation of any property, troops or mails of the United States over the same, or that it was not constructed and completed in all respects as required by said act of Congress. And these defendants deny that they were ever required by law to maintain the same as a public highway by a law of Congress and by an act of the Legislative Assembly of the State of Oregon.

In answer to paragraph IX of said bill, these defendants admit that the said act of Congress in granting the land in the bill of complaint mentioned, to the State of Oregon, declares that the lands so granted shall be exclusively applied to the construction of the road, and to no other purpose; but they say that at the time of the purchase by them of the lands in the bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor, they had not, and have not, any knowledge or notice that the said lands were not so disposed of, or that the proceeds thereof were not applied exclusively to the construction of said road, or to the construction of bridges thereon, or to the establishment of ferries on streams along the line of said road.

In answer to paragraph X of the said bill of complaint, these defendants deny allegations therein contained.

In answer to paragraph XI of the said bill, the defendants admit that the allegations contained therein are true.

In answer to paragraph XII of said bill, these defendants admit that patents for a portion of said lands included in the grant made by said act of Congress were issued to The Dalles Millitary Road Company, and they believe the amount or number of acres specified in Exhibit "A," attached to the bill, to wit, 126,910.23 acres, is correct. But these defendants say that they have not, and had not at the time of the purchase by them of the said lands, and of the payment of the purchase money, and delivery of the deeds therefor, any knowledge, information or notice that the President of the United States was, on the 19th day of June, 1876, or at any time, deceived, misled, or imposed upon by the false or any false or fraudulent certificates hereinbefore set forth, or was thereby induced to issue the said patent or patents.

In answer to paragraph XIII of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph XIV of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph XV of the said bill, these defendants say that the same is not a correct statement of the length of the said road, that the said road was surveyed after its completion, to wit, between April 22nd and May 17th, 1869, by David P. Thompson, and the length of said road from the court house in Dalles City to Fort Boise, on Snake River, was three hundred and thirty and a half miles. This and the time when the survey was commenced and ended, appears by the certificate on the map made by D. P. Thompson. And these defendants deny that the Dalles Military Road Company inequitably claims the right to have the patent issued for all the land embraced within said grant not already patented to it. And they say it has a good right in equity to such patent.

In answer to paragraph XVI of said bill, these defendants say that neither any one or more of them, nor the said Edward Martin, deceased, nor any person or persons holding title to the said lands through or under him, or to any portion of said lands at the time of the execution and delivery of the said

deeds, or any one or more of said deeds specified in the bill of complaint, or the exhibits thereto attached, had full knowledge or any knowledge whatever that the road provided for by said act of Congress, approved February 25th, 1867, had not at any time been constructed as required by the said act of Congress, and the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, so as to be in any sense whatever a public highway: or so that it could be used by the United States, or by any of the residents or citizens thereof, as a public highway, or so that the United States could transport its property, troops or mails over the same. And they deny that they or any of them, or that the said Edward Martin had full or any knowledge that no grades had been established, that no clearing had been done on any part thereof, no bridges built over any streams on the line thereof, and no cuts made, and no turnouts constructed anywhere on the line of The Dalles Military Road Company. And they deny that they or any of them had full or any knowledge that said road was not begun nor completed within five years from the date of the passage of said act of Congress, approved February 25th, 1867, or that it had never been begun or constructed. And they deny that they or any of them well knew or knew at all, that the statements made in the certificate of the Governor of Oregon hereinbefore set forth were false, or that the Governor did not at any time whatsoever examine the road referred to in his certificate, or that the said certificate had been procured by false or fraudulent representations, or that the patent aforesaid was found to be issued upon said false and fraudulent procured certificate.

And the defendants, further answering the matters in said bill of complaint alleged, say:

That in or about the month of February, 1875, Edward Martin, deceased, James Phelan and the defendant, D. V. B. Henarie, purchased of The Dalles Military Road Company the lands in the complaint herein described an undivided one-half of said lands being purchased by said James Phelan, and an undivided one-fourth each, by said Martin and Henarie, and that afterwards, to wit, about the 31st day of May, 1876, a deed to said lands was made by said Dalles Military Road Company to Edward, Martin as set forth in paragraph XIII of

said bill of complaint. But that said Edward Martin took the legal title to one-half said property in trust for said Phelan and the legal title to one-fourth said property in trust for said Henarie; that at the time of making said purchase, and at the time of the execution and delivery of said deed, they and each of them were residents of the State of California: and placing confidence in the truth of the hereinbefore mentioned certificate of the Governor of Oregon that the said road had been duly and seasonably constructed and completed in accordance with the terms of the said granting acts, and also in the said several certificates of the Commissioner of the General Land Office and the Secretary of the Interior, and the said act of Congress approved June 18th, 1874, and cited in the eleventh paragraph of the bill of complaint herein, did make said purchase in good faith, and for a valuable consideration, to wit, for the total sum of $125,000, from The Dalles Military Road Company and the stockholders of said company.

And these defendants aver that said sum of $125,000 was paid by said Martin, Phelan and Henarie in money truly and bona fide, and without notice previous thereto, and to the delivery of the conveyance thereof of any of the pretended fraudulent representations or acts in the bill of complaint set forth, and without any reason to believe or suspect that there had been any fraudulent act or misreprensation, or that there had been any failure of duty in the examination or certifying the completion of said road or any part thereof, or that said road had not been wholly, seasonably and properly completed in accordance with the requirements of said granting acts. That on or about the 31st day of May, 1875, said Edward Martin purchased from said James Phelan an undivided one-half of said lands so held by said Martin for said Phelan.

That said purchase was made in good faith and for a valuable consideration, to-wit, for the sum of $62,500 paid by said Martin to said Phelan; and at the time of said purchase and the payment of the consideration therefor, said Martin had no knowledge or notice of any of the pretended fraudulent acts or representations in the bill of complaint set forth, and had no reason to believe or suspect that there had been any fraudulent act or misrepresentation, or that said road had not been seasonably and properly constructed.

That afterwards, to-wit, on the 12th day of May, 1880, the said Edward Martin died intestate in the City of San Francisco, leaving a widow, the defendant, Eleanor Martin, and leaving as his heirs at law, Thomas S. Martin, Edward Martin, and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors; that in March, 1882, the interest of said minors in said lands was sold at a guardian's sale by order of the County Court of Wasco County, Oregon, at which sale the interests of said minors in said lands was purchased in good faith for a valuable consideration by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear by exhibit "C," attached to the bill of complaint.

That on August 3d, 1882, the said James Phelan sold his interest in said lands to Peter Donahue, as will more fully appear by exhibit "D," attached to the bill of complaint. That the defendant P. J. Martin acquired his interest in said land grant by purchase from John D. Wilcox, the heir of Sarah F. Wilcox, deceased, who was one of the heirs of said Edward Martin, deceased.

That the said defendants, Eleanor Martin and P. J. Martin, and the said purchasers James Phelan and Peter Donahue, relying upon and placing confidence in the truth of the hereinbefore mentioned certificate of the Governor of Oregon; that the said road had been duly and seasonably constructed and completed in accordance with the terms of said granting acts, and also in the said several certificates of the Commissioner of the General Land Office and Secretary of the Interior, and upon the act of Congress approved June 18th, 1874, authorizing patents to be issued for said land, did purchase their respective interest in said lands in good faith and for a valuable consideration, and without notice previous thereto of any of the pretended fraudulent representations or acts in the bill of complaint set forth, and without any reason to believe or suspect that there had been any fraudulent act or misrepresentation or failure of duty in the examination, or certifying the completion of said road, or any portion thereof, or that said road had not been wholly, seasonably and properly completed in accordance with the requirements of said granting acts.

That on the 11th day of August, 1884, all the heirs of said Edward Martin, and all persons who held an interest by purchase in said lands, to wit, P. J. Martin, Eleanor Martin, D. V. B. Henarie, Peter Donahue, Edward Martin, James V. Martin, Thomas S. Martin, Genevieve E. Walker and Joseph W. Winnums, sold and by deed conveyed all their interest in said lands and land grant to the Eastern Oregon Land Company, and that said named grantors were the principal promotors, organizers and original stock subscribers and stockholders of the defendant, the Eastern Oregon land Company; that said company is duly incorporated under the laws of the State of California, and was organized for the purpose of taking said land grant and as a convenient means of managing said property, and in the interest of the said several purchasers in said land grant; and to this end the several purchasers did, on or about the 11th day of August, 1884, convey to said company their said several interests in said grant, in consideration of the interest and stock in said corporation severally held by them; that at the time of the said transfer and conveyance to said corporation, neither the said company nor any of its officers, agents or stockholders had any notice or reason to believe or suspect that there had been any frauduleut act or misrepresentation, or failure of duty in the examination or certifying aforesaid, but the transfer to and taking by said company was had and done really bona fide, and upon the confidence placed by them in the truth of said certificate; and in reliance upon the hereinbefore mentioned listing of lands and upon the said act of Congress, approved June 18th, 1874.

That so confiding and so relying and without notice or reason to believe or suspect any of the alleged fraudulent acts or misrepresentations in the bill of complaint charged, the said promotors and the said Eastern Oregon Land Company have really and bona fide expended large sums of money in the care of said land and in the payment of taxes levied under the laws of Oregon.

That the Eastern Oregon Land Company now holds the legal title to all the said lands granted to The Dalles Military Road Company, except such as have heretofore been sold and conveyed by The Dalles Military Road Company and its grantees and the said Eastern Oregon Land Company.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the bill charged, without this that there is any other matter, cause or thing in the said complainant's said bill of complaint material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, transferred and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf, most wrongfully sustained.

D. V. B. HENARIE.
ELEANOR MARTIN.
P. J. MARTIN.

(SEAL E. O. L. Co.) D. V. B. HENARIE,
President of the Eastern
Oregon Land Company.

Attest: T. P. BEACH,
Secretary E. O. L. Co.

JAMES K. KELLY and A. L. FRAZER,
Solicitors for Defendants.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

The answer of the defendants, The Eastern Oregon Land Company, was taken this 28th day of October, 1891, before me, under the common seal of the said corporation, as by their said seal thereto attached appears.

(SEAL) L. S. B. SAWYER,
Clerk and Commissioner United States Circuit Court
Northern District of California.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On this 28th day of October, 1891, before me personally appeared Eleanor Martin, P. J. Martin and D. V. B. Henarie, President of the Eastern Oregon Land Company, and made oath that they have heard the foregoing answer read and know the contents thereof, and that the matters and things set

forth therein, so far as it relates to their own acts, are true, and so far as it relates to the acts of others they believe the same to be true.

And said D. V. B. Henarie on oath further says that he is President of the Eastern Oregon Land Company, one of the defendants, and is familiar with its business affairs; that the facts set forth in the foregoing answer so far as the same are stated on his personal knowledge are true, and so far as not stated upon his personal knowledge he believes the same to be true.

Before me, this 28th day of October, 1891.

(SEAL) L. S. B. SAWYER,

Clerk and Commissioner United States Circuit Court, Northern District of California.

[Endorsed]: Filed November 11, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 14th day of November, 1891, there was duly filed in said court a replication to amended plea and answer in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, Plaintiff.
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada E. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants.

The replication of the plaintiff to the joint and several amended pleas, and amended answer acompanying said plea of the defendants, D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said amended plea and answer, for replication thereunto saith, that it will aver and prove its said bill to be true, certain

and sufficient in the law to be answered unto; and that said amended plea and answer of the said defendants are uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said amended plea and answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be ready to aver and prove, as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

F. P. MAYS,
U. S. District Attorney, and
A. H. TANNER,
Solicitors for Complainant.

Due service of the within replication by certified copy as provided by law, is hereby admitted at Portland, Oregon, November 13th, 1891.

A. L. FRAZER,
Of Attorneys for Defendants.

[Endorsed]: Filed November 14, 1891.

R. H. LAMSON,
Clerk.

And afterwards, to wit, on the 25th day of November, 1891, there was duly filed in said Court a certificate from examiner in words and figures following, to wit:

Monday, October 26, 1891.

At this time the parties to the above entitled cause appeared before me at my office, the complainant being represented by A. H. Tanner, of counsel, and the defendants by A. L. Frazer, Esq., their solicitor, whereupon the following proceedings were had, to wit:

Counsel for complainant now offers to call witnesses to show that the wagon road known as The Dalles Military Road, and referred to in the bill in this suit, was never built as required by the act of Congress, and that the certificate of the Governor that it was built and constructed was obtained by misrepresentation.

Counsel for the defendants objects to the introduction of that part of this testimony which refers to the building or construction of said road, on the ground that it is immaterial and ir-

relevant for the purpose of controverting the matters contained in the plea, or the testimony introduced in pursuance thereof, and objects to that part of said testimony which refers to misrepresentation having been made in obtaining the certificate of the Governor that it was built and constructed, unless such misrepresentations were made by one or more of the officers, stockholders or agents of The Dalles Military Road Company, or by some other person or persons for or in its interest or behalf.

Whereupon Ad. Edgar was called and duly sworn as a witness on behalf of the complainant, and was interrogated as follows by complainant's counsel:

Q. State fully and at length all you know as to whether or not the wagon road known as The Dalles military road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully all that you know in reference to the way the certificate of the Governor of Oregon that said road, or portions thereof, had been built were obtained.

Counsel for defendants objects to the first part of the question relating to the construction or building of said road as irrelevant and immaterial to the issues made by the plea in this cause, and as immaterial for the purpose of answering any evidence taken in support of the plea, and for the further reason that the plea raises no issue upon the question of the construction of the road. And counsel objects to the latter part of said question relating to the manner of obtaining the certificate of the Governor of Oregon as to the building of said road unless said certificate was obtained by fraud, misrepresentations or undue influence on the part of one or more of the officers, stockholders or agents of The Dalles Military Road Company, or by some other person or persons for or in its interest or behalf. And before an answer shall be made to the question counsel for the defendants requests the examiner to certify the question to the Court for his opinion as to whether the question should be answered.

Examiner's note—Before taking the answer I will certify this question to the Court as a question by counsel for defendant for the purpose of taking the opinion of the Court as to the

relevancy and materiality of the testimony sought by the question referred to.

GEO. H. DURHAM, Examiner.

DISTRICT OF OREGON—ss.

I, G. H. Durham, Examiner, hereby certify the foregoing record and questions contained therein to the Honorable the Circuit Court of the United States for its ruling upon the admissibility of the testimony sought to be elicited, and certify that the foregoing is a complete copy of the record pertaining to the question in controversy.

GEO. H. DURHAM, Examiner.

Monday, October 26, 1891.

[Endorsed]: Filed November 25, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Wednesday, the 25th day of November, 1891, the same being the thirty-second judicial day of the regular October term of said court (present the Honorable Matthew P. Deady, United States District Judge, presiding), the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

November 25, 1891.

Now, at this day, this cause comes on to be heard upon the question and objection thereto certified by the examiner, as follows:

Question by counsel for plaintiff, propounded to A. D. Edgar a witness for said plaintiff: "State fully and at length all you know as to whether or not the wagon road known as the Dalles military road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificate of the Governor of Oregon that said road or portion thereof had been built, were obtained." "Counsel for defendants objects to the

first part of the question, relating to the construction or building of said road, as irrelevant or immateriai to the issues made by the plea in this cause, and as immaterial for the purpose for answering any evidence taken in support of the plea, and for the further reason that the plea raises no issue upon the question for the construction of the road. And counsel objects to the latter part of the question relating to the manner of obtaining the certificate of the Governor of Oregon as to the building of said road, unless said certificate was obtained by fraud, misrepresentations or undue influence on the part of one or more of the officers, stockholders or agents of The Dalles Military Road Company, or by some other person or persons for, or in its interest or behalf," and was argued by Mr. A. H. Tanner of counsel for the plaintiff, and by Mr. A. L. Frazer, of counsel for the defendants. On consideration whereof, it is ordered and adjudged that said objection be and the same is hereby sustained.

And afterwards, to wit, on Friday, the 27th day of November, 1891, the same being the 33rd judicial day of the regular October term of said Court: present, the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY, *et al.* } No. 1612.

November 27, 1891.

Now, at this day, comes the defendant, The Dalles Military Road Company, by Mr. A. L. Frazer, of counsel, and moves the Court that the bill herein be dismissed as to said defendant, for want of replication to the answer of said defendant. It is therefore ordered and adjudged, that the bill of complaint herein be, and the same is hereby dismissed as to said defendant, The Dalles Military Road Company: Whereupon this cause comes on to be heard upon the pleas and answers of the defendants, Eleanor Martin, P. J. Martin, D. V. B. Henarie, and the Eastern Oregon Land Company, the replication thereto and the testimony, the plaintiff appearing by

Mr. Franklin P. Mays, United States Attorney, and Mr. A. H. Tanner, of counsel, and said defendants by A. L. Frazer, of counsel, and the Court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on the 2d day of December, 1891, there was duly filed in said Court a motion to set aside order dismissing bill as to D. M. R. Co. et al., in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, et al., defendants.

Now comes the above named complainant and moves the Court to vacate and set aside the order made and entered in this cause on the 27th day of November, 1891, dismissing this suit as to the defendants, The Dalles Military Road Company, James K. Kelly and C. N. Thornbury, as having been entered herein by inadvertence, and for leave to file a replication to the answer of the said defendants, the Dalles Military Road Company, James K. Kelly and C. N. Thornbury, if the replication already filed is held by the Court not to apply as a replication to said answer.

F. P. MAYS, and
A. H. TANNER,
Solicitors for Complainant.

STATE OF OREGON, }
County of Multnomah. } ss.

I, L. A. Ward, being first duly sworn, say that I am a citizen of the United States, above the age of 21 years, and that I served the foregoing motion on Arthur L. Frazer, one of the solicitors for said defendants herein named, in the City of Portland, Oregon, on the 2d day of December, 1891, by leaving a true and correct copy thereof with Miss Ogbee, and delivering to her said copy in the office of said Arthur L. Frazer, he not being found.

L. A. WARD.

Subscribed and sworn to before me this 2d day of December, 1891.

(SEAL) A. H. TANNER,
Notary Public.

[Endorsed]: Filed December 2, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Wednesday, the 2d day of December, 1891, the same being the 35th judicial day of the regular October term of said Court, present, the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY ET AL. } No. 1612.

December 2, 1891.

Now, at this day, on motion of Mr. Franklin P. Mays, United States Attorney, it is ordered that this cause be and the same is hereby set for hearing on the motion to set aside the order dismissing the bill herein as to the defendants, The Dalles Military Road Company, and for leave to file a replication to the answer of said defendants on Friday, December 4, 1891.

And afterwards, to wit, on Monday, the 7th day of December, 1891, the same being the thirty-ninth judicial day of the regular October term of said Court (present, the Honorable Matthew P. Deady, United States District Judge, presiding), the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company. } No. 1612.

December 7, 1891.

This cause was heard upon the bill, the amended pleas and answer of the defendants, D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company, the replication thereto, the testimony and exhibits, and was argued by Mr. Franklin P. Mays, United States Attorney, and Mr. Albert H. Tanner, of counsel for the plaintiff, and by Mr. Arthur L. Frazer, of counsel for said defendants. On consideration whereof, the Court finds that the certificate of the Governor of Oregon, declaring the road mentioned in the bill to have been duly constructed, was truthfully made without fraud or misrepresentation on the part of any one: and that said defendants are purchasers of the lands described in said bill from The Dalles Military Road Company, in good faith, for a valuable consideration, and without notice of any fraud or misrepresenation on the part of said Dalles Military Road Company, or any one else. It is therefore ordered, adjudged and decreed that said pleas of said defendants be and the same are hereby sustained, and that said bill of complaint be and the same is hereby dismissed as to said defendants D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company.

(Signed) DEADY, J.

[Endorsed]: Filed December 7, 1891.

R. H. LAMSON, Clerk.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY, *et al.* } No. 1612.

December 7, 1891.

This cause was heard upon the motion of the plaintiff to vacate and set aside the order heretofore entered herein, dismissing the bill as to the defendant The Dalles Military Road Company, and for leave to file a replication to the answer of said defendant, and was argued by Mr. Franklin P. Mays, United States Attorney, and Mr. Albert H. Tanner, of counsel for the plaintiff, and by Mr. Arthur L. Frazer, of counsel for said defendant. On consideration whereof it is ordered and adjudged

that said motion be and the same is hereby denied, with leave to said plaintiff to make a further showing on said motion.

And afterwards, to-wit, on the 7th day of January, 1892, there was duly filed in said Court an assignment of errors in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants.

The above named complainant, conceiving itself aggrieved by the proceedings in this cause, and the final decree entered in the above entitled cause and court on the 7th day of December, 1891, doth hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and it prays that this appeal may be allowed, and that transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the clerk of the said Court, as provided by law and the rules thereof.

The complainant hereby assigns the following grounds of error upon which it claims and alleges that said decree was erroneous and should be reversed, to-wit:

First—The Court erred in sustaining the exceptions taken by the defendant, The Dalles Military Road Company, James K. Kelly and C. N. Thornbury, filed herein September 12th, 1889, to the portions of the bill of complaint herein filed and specified in said exceptions.

Second—The Court erred in sustaining the exceptions of the defendants to the testimony offered by complainant after the defendants had taken their testimony and rested, upon the issues arising upon the plea and answer filed herein; and in sustaining said defendants' objection to the following question propounded to the witness A. D. Edgar, "State fully and at

length all you know as to whether or not the wagon road, known as the Dalles military road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said Company in reference thereto, and state fully also all that you know in reference to the way that the certificates of the Governor of Oregon that said road or portions thereof had been built, were obtained."

Third—The Court erred in making and entering the decree as made and entered herein on the 27th day of November, 1891, dismissing the bill as to the defendant, The Dalles Military Road Company, for want of replication to the answer of said defendant.

Fourth—The Court erred in overruling and denying the motion of the complainant to set aside and vacate said decree of November 27th, 1891, dismissing the bill as to the defendant, The Dalles Military Road Company, as having been entered by inadvertence, and for leave to file a replication.

Fifth—The Court erred in making the said decree made and entered herein on the 7th day of December, 1891, sustaining the plea of said defendants D. V. B. Hendricks, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company, and in dismissing the bill of complaint as to the said defendants.

Sixth—The finding of the Court in said decree, that the certificate of the Governor of the State of Oregon declaring the road mentioned in the bill to have been duly constructed, was true, duly made, without any fraud or misrepresentation on the part of any one, is contrary to the admissions made in the plea and answer of the said defendants and is against the evidence and contrary to law.

Seventh—The finding of the Court in said decree, that the said defendants are purchasers of the land described in the said bill from The Dalles Military Road Company in good faith and for a valuable consideration, without notice of any fraud or misrepresentation on the part of the said Dalles Military Road Company or anyone else, is against the evidence and contrary to law.

Eighth—The said decree and findings are erroneous, against the evidence and contrary to law.

F. P. MAYS, U. S. Dist. Atty., and
A. H. TANNER, Special Assistant,
Solicitors for Complainant.

[Endorsed]: Filed January 7, 1892.
R. H. LAMSON, Clerk.

And afterwards, to wit, on Thursday, the 7th day of January, 1892, the same being the 58th judicial day of the regular October term of said court, present, the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY, ET AL. } No. 1612.

January 7, 1892.

Now, at this day, on motion of Mr. Albert H. Tanner, of counsel for the plaintiff, it is ordered that said plaintiff be and it is hereby allowed to take an appeal of this cause from the decree rendered therein on December 7, 1891, to the United States Circuit Court of Appeals for the Ninth Circuit.

*In the Circuit Court of the United States for the District of Oregon.*

The President of the United States of America to L. S. B. Sawyer—Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you full power and authority diligently to examine D. V. B Henarie, James Phelan and David P. Belknap, each upon his corporal oath or affirmation, before you to be taken, and upon the interrogatives and cross-interrogatories hereto annexed, as a witness on the part of the defendants in a certain cause now pending undetermined in the Circuit Court of the United States of America for the District of Oregon, wherein

the purchase of that land the amount of the consideration paid and the manner in which it was paid.

Interrogatory 5. What was your agent if any one in making the purchase?

Interrogatory 6. State whether or not you and your associates obtained a report or the opinion of an expert as to the character and value of the land before purchasing?

Interrogatory 7. Was the amount paid for the land the full value of it at that time?

Interrogatory 8. Did you have an abstract and examination of the title of the land made before purchasing?

Interrogatory 9. Did you submit the question as to whether or not the title to the land was good to attorneys. If so who were the attorneys and what was their opinion?

Interrogatory 10. Did you at the time you purchased your interest in the land have any knowledge of any fraud having been used in the construction of the Dalles military road or in obtaining the Governor's certificate as to the construction and completion of that road, or in having certain parts of said land listed by the Secretary of the Interior or in procuring certain parts of said lands to be patented by the President of the United States?

Interrogatory 11. Did you at that time have any information that would lead you to suspect that fraud had been used in any of those transactions, or had you heard any one claim that fraud had been practiced in any way by The Dalles Military Road Company, or its officers or agents?

Interrogatory 12. Did Edward Martin, at the time he purchased his interest in said land, to your knowledge have any reason to believe that fraud had been used in the construction of said road or in procuring said Governor's certificate or in any way in connection with said land grant?

Interrogatory 13. What interest do you now own in the land in question?

Interrogatory 14. What amount of stock in the Eastern Oregon Land Company do you now own?

Interrogatory 15. For what purpose was the Eastern Oregon Land Company organized?

Interrogatory 16. State why and upon whose advice Edward Martin and yourself first purchased the stock of The

Dalles Military Road Company before taking the deed to the property?

Interrogatoy 17. Did The Dalles Military Road Company own any property other than this land grant?

Interrogatory 18. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause. If yea, set forth the same fully and at large in your answer?

Interrogatories to be propounded to James Phelan, a witness on behalf of defendants.

Interrogatory 1. State your name, residence and occupation.

Interrogatory 2. Where did you reside in the years 1874, 1875 and 1876?

Interrogatory 3. Were you acquainted with Edward Martin during those years?

Interrogatory 4. Were you a party to the purchase of the land grant of The Dalles Military Road Company in Oregon, and if so, what interest did you purchase? State all the circumstances connected with the purchase fully.

Interrogatory 5. What did you pay for your interest in the land, and what was the whole consideration paid by all the purchasers?

Interrogatory 6. How did you dispose of your interest in the land and what consideration did you receive for it, if you sold it?

Interrogatory 7. How was this consideration paid?

Interrogatory 8. Did you at or before the time you purchased your interest in this land know or have any notice of any fraud having been used in the construction of the Dalles military road, or in procuring the certificate of the Governor of Oregon, as to its construction and completion, or in procuring parts of said land to be listed by the Secretary of the Interior, or in procuring patents to be issued for part of said land by the President, or in any other matter connected with said land grant?

Interrogatory 9. Did you at any time have any information that would lead you to believe or suspect that fraud had

been practiced in any of said matters, or had you heard anyone claim that fraud had been so used or practiced?

Interrogatory 10. Have you now any interest in said land grant or in this suit?

Interrogatory 11. Have you ever, before or since the purchase, examined this land? If so, describe it. State whether it is level or mountainous, and what proportion of it rocky, and what portion is susceptible of cultivation?

Interrogatory 12. Was the price paid The Dalles Military Road Company for the land the full value of the land at that time or otherwise?

Interrogatory 13, Did you ever before purchasing have an abstract of title of this land made, and submitted to attorneys. If so when was it, and who were the attorneys: what was their opinion as to the title?

Interrogatory 14. Would you have purchased any interest in this land if you had thought there was any question as to its title, or if you had known of any fraud in connection with obtaining it from the Government?

Interrogatory 15. Did Edward Martin at the time he purchased his interest in said land to your knowledge have any reason to believe that fraud had been practiced in the construction of said road or in obtaining the said Governor's certificate, or in any way in connection with said land grant.

Interrogatory 16. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to this, your examination, or the matter in question in this cause. If yea, set forth the same fully and at large in your answer.

Interrogatories to be propounded to D. P. Belknap as a witness on behalf of defendant:

Interrogatory 1. State your name, age, residence and occupation?

Interrogatory 2. What was your business, and of what firm, if any, were you a member in 1874, 1875 and 1876?

Interrogatory 3. Did you or your firm ever examine an abstract of title to the land grant of The Dalles Military Road Company in Oregon for Edward Martin and others, and give an opinion as to that title: if so, when was it, and what was

the opinion you gave them in regard to the title to that land being good or otherwise?

Interrogatory 4. Was there anything in the abstract examined by you, if you examined one, or in any of the papers relating thereto submitted to you, to indicate that there had been any fraud used in the construction of said road or in obtaining the certificate of the Governor of Oregon as to its construction and completion, or in any other matter connected with obtaining said land grant?

Interrogatary 5. Did Edward Martin or his associates rely upon the opinion of yourself or your firm as to the title of said land in deciding whether or not to purchase said land?

Interrogatory 6. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matter in question in this cause. If yea, set forth the same fully and at large in your answer.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, et al., defendants.

Cross-interrogatories to be propounded to D. V. B. Henarie, a witness on behalf of defendants:

Cross Int. 1. Did you see any part of the consideration paid for said land grant of The Dalles Military Road Company; and if so, what part and when was it paid and who else was present?

Cross Int. 2. Don't you know as a matter of fact that said consideration was paid for the stock of the said Dalles Military Road Company instead of the said land grant?

Cross Int. 3. Had you, at or prior to the time of said purchase of said stock, ever been in the State of Oregon or seen or inspected any of the lands included in said grant? If so, when?

Cross Int. 4. If you say you obtained the opinion of an expert of the character and value of said land before purchas-

ing the same, please give the name of said expert and state whether he made any written report, and if so annex the same to your deposition, or if you have it not, state what has become of it, and state where the said expert is at this time, if you know?

Cross Int. 5. Have you ever, at any time, examined the lands included in said grant, or are you in any way familiar with the value of lands of the character of those included in said grant?

Cross Int. 6 If you say you had an abstract or an examination of the title of said land made before purchasing the stock of said company, please state fully who made and furnished said abstract and whether any certificate of title was furnished you. If any, when. And if so, where is the said abstract or certificate of title, and if you have them or either of them please annex them as a part of your deposition in this case?

Cross Int. 7. If you say you submitted the question as to whether or not the title to the land was good in said company to attorneys, and obtained their opinion on reference thereto, state who said attorneys were. Whether they gave any written opinion, and if so, where is said opinion. If you have it, produce it and annex it to your deposition in this case?

Cross Int. 8. Had you at any time prior to the purchase of the stock of said Dalles Military Road Company ever seen the certificate of the Governor as to the construction or completion of said road. If so, where did you see them and when was it, and who else was present?

Cross Int. 9. Was not, as a matter of fact, the whole transaction of the purchase of the stock of the Dalles Military Road Company left to P. J. Martin, and did he not act as agent in said matter for Edward Martin and your associates in the purchase of said stock?

Cross Int. 10. Have you any personal knowledge as to whose advice Edward Martin acted upon in the purchase of said stock, or as to whether or not the said Dalles Military Road Company owned any other property than the land grant in question.

Cross Int. 11. How much money did you advance or furnish for the purchase of the stock of the said Dalles Military

Road Company, and to whom did you furnish the same, and when was it?

F. P. MAYS, and
A. H. TANNER,
Solicitors for Complainant.

Cross-interrogatories to be propounded to James Phelan, a witness on behalf of the defendants.

Cross Int. 1. Don't you know, as a matter of fact, that the consideration paid by Edward Martin and yourself and others, was paid for the stock of The Dalles Military Road Company, and did not Edward Martin and yourself and associates first buy up the stock of the company and pay the consideration money, whatever it was, for said stock in said company?

Cross Int. 2. When was it you disposed of your interest in the said Dalles Military Road Company, or its land grant, and to whom did you sell?

Cross Int. 3. If you say the consideration for which you sold was paid by note or other obligation, state whether or not said note or obligation has been paid off, and if so, by whom and when, and how much was paid?

Cross Int. 4. If you say you furnished any part of the consideration for the purchase of the stock of said Dalles Military Road Company, state what part of the money you furnished and to whom you furnished it, and when was it?

Cross Int. 5. Had you at or prior to the time of the purchase of said stock been in the State of Oregon, or ever seen the lands included in the land grant of said company, or have any personal knowledge as to the character or value of said lands, State fully what inquiries you made to ascertain whether or not any fraud had been used in the construction of the road of the said Dalles Military Road Company, or in procuring certificates of the Governor of Oregon, of said completion, and what investigation, if any, you made as to the title of said company to said land grant or its rights therein?

Cross Int. 6. Did you not, as a matter of fact, leave the whole matter of said purchase to Edward Martin, without having any personal knowledge in reference to the matter?

Cross Int. 7. Why was it you sold out your interest in said Dalles MilitaryRoad Company and its land grant to Edward Martin, and when was it?

Cross Int. 8. Had you ever bought or sold any land in the vicinity of the land grant of The Dalles Military Road Company, and have you any special knowledge as to the value of lands in that vicinity?

Cross Int. 9. Describe particularly the portion of the lands included in said grant you have examined, if you have examned any portion thereof?

Cross Int. 10. If you say that before purchasing you had an abstract of the title of the said land made and submitted to attorneys, state who made or furnished the said abstract of title and where it is, and if you have it or can procure it please produce it and attach it to your deposition in this case; was there attached to said abstract any certificate as to the title of the said company to said lands?

Cross Int. 11. If you say said abstract was submitted to attorneys, state who said attorneys were, and whether they furnished any written opinion as to the title or certificate thereof, If so, please state where it is, and if you have it, produce it and attach it to your deposition in this case?

Cross Int. 12. Didn't P. J. Martin act as the agent of yourself and Edward Martin and associates in purchasing the stock of said company and in acquiring your interest therein?

F. P. MAYS and
A. H. TANNER,
Solicitors for Complainant.

Cross-interrogatories to be propounded to D. P. Belknap, a witness on behalf of defendants:

Cross Int. 1. If you say that you or your firm have examined any abstract of title to the land grant of The Dalles Military Road Company in Oregon for Edward Martin and others, and gave an opinion as to that title state whether or not such opinion was in writing, or whether or not you furnished any certificate as to title, or any written opinion or statement in regard thereto?

Cross Int. 2. If you say you did give a written opinion or certificate of title, state whether you have or retained any copy thereof; if so, please produce it and attach it to your deposition in this case?

Cross Int. 3. State who employed you to examine said ab-

stract, if you did examine it, and all that was said to you in reference to said land grant and the title of The Dalles Military Road Company to said lands?

Cross Int. 4. Do you know what became of the abstract that you examined, and by whom it was made or signed, if you know, and did said abstract have in it the act of Congress making said grant and the act of the Legislature of Oregon and the certificates of the Governor's mentioned in the bill in this case; state as near as you can what the contents of said abstract was; did you know at the time you examined the said abstract that a large amount of the lands included in said grant had not been surveyed, or listed, or patented to the said Dalles Military Road Company?

Cross Int. 5. Did you in your examination as to the title and rights of said company in and to said land grant make any inquiries to ascertain whether or not, as a matter of fact, said company had constructed or completed the wagon road provided for in the said act of Congress, or did you advise or instruct Edward Martin or his associates to make any such inquiries or research or examination?

Cross Int. 6. Did you not explain to Edward Martin or his associates at the time you examined the said abstract of title and gave an opinion in reference to it; if you say you did so, that the said land grant was a conditional one, and that the lands would have to be entered by a compliance with those conditions on the part of The Dalles Military Road Company?

Cross Int. 7. Did you not know at the time you examined the said abstract and gave an opinion, if you did do so, that as to all that portion of said land grant for which patents had not been issued, the legal title was still in the Government of the United States?

Cross Int. 8. Did Edward Martin or any of his associates express any hesitation or doubt as to the advisability of making said purchase, or come to Oregon, either of them, to make any further investigation in reference thereto?

Cross Int. 9. State all that was said by Edward Martin to you in reference thereto?

F. P. MAYS and
A. H. TANNER,
Solicitors for Complainant.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES
*vs.*
THE DALLES MILITARY ROAD COMPANY, *et al.*

Be it remembered, that on the 14th, 16th and 17th days of September, A. D. 1871, at my office, room 51, in the United States Court Building, in the City of San Francisco, District of California, personally appeared before me L. S. B. Sawyer, a Commissioner, duly appointed by the Circuit Court of the United States for the Ninth Circuit and District of Oregon, D. V. B. Henarie, David P. Belknap and James Phelan, witnesses on behalf of the defendants in the above entitled suit.

And the said witnesses having been by me first cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, in the cause aforesaid, did thereupon depose and say as follows, that is to say:

D. V. B. HENARIE, being first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in answer to the interrogatories and cross-interrogatories, deposes and says, as follows:

In answer to interrogatory 1—State your name, age, residence and occupation.

The witness answers—My name is D. V. B. Henarie; my age 68 years; my residence San Francisco, and occupation merchant.

In answer to interrogatory 2—Where do you reside and in what business were you engaged in the years 1874, 1875 and 1876?

The witness answers—I reside in San Francisco, and was engaged in the wholesale liquor business.

In answer to interrogatory 3—Were you associated with Edward Martin in the purchase of the land grant of The

Dalles Military Road Company, and if so, what interest did you have in that purchase?

The witness answers—I was; I purchased one-fourth interest in the whole.

In answer to interrogatory 4—State the circumstances connected with the purchase of that land, the amount of the consideration paid, and the manner in which it was paid?

The witness answers—Mr. Edward Martin and Mr. James Phelan had looked into the matter and thought it a desirable investment, therefore I joined with them in the purchase, taking a one-fourth interest. The amount of the consideration paid for the whole was about $125,000, of which I paid one-fourth. We paid the amount of purchase money by checks on the Bank of California and First National Gold Bank. These checks were given in payment of drafts drawn by P. J. Martin, our agent in Oregon.

In answer to interrogatory 5—Who was your agent, if any one, in making the purchase?

The witness answers—P. J. Martin.

In answer to interrogatory 6—State whether or not you and your associates obtained a report, or the opinion of any expert, as to the character and value of the land before purchasing?

The witness answers—I understood from Mr. Edward Martin that he had a report. Mr. Martin and Mr. Phelan gave the matter particular attention. I did not, as I relied on their judgment.

In answer to interrogatory 7—Was the amount paid for the land the full value of it at that time?

The witness answers—It was certainly a big price, and I think more than the land was worth at the time.

In answer to interrogatory 8—Did you have an abstract and examination of the title of the lands made before purchasing?

The witness answers—As I have said in my answer to question 6, Mr. Edward Martin was giving this matter particular attention and I relied upon him. He assured me that he had the title examined, and that it was a perfect one.

In answer to interrogatory 9—Did you submit the question as to whether or not the title of the land was good to attorneys. If so, who were the attorneys and what was their opinion?

The witness answers—Yes; Mr. Edward Martin submitted the matter of title to Winans & Belknap, attorneys in this city, and they gave their opinion that the title to the land was perfect.

In answer to interrogatory 10—Did you at the time you purchased your interest in the land have any knowledge of any fraud having been used in the construction of the Dalles military road, or in obtaining the Governor's certificate as to the construction and completion of that road, or in having certain parts of said land listed by the Secretary of the Interior, or in procuring certain parts of said land to be patented by the President of the United States?

The witness answers—No; none whatever.

In answer to interrogatory 11—Did you at that time have any information that would lead you to suspect that fraud had been used in any of those transactions, or had you heard anyone claim that fraud had been practiced in any way by The Dalles Military Road Company or its officers or agents.

The witness answers—No; I never had heard one word of the kind, and had no reason to suspect anything of the sort.

In answer to interrogatory 12—Did Edward Martin at the time he purchased his interest in said land, to your knowledge, have any reason to believe that fraud had been used in the construction of said road, or in procuring said Governor's Certificate, or in any way in connection with said land grant?

The witness answers—He had not, to my knowledge.

In answer to interrogatory 13—What interest do you own in the land in question.

The witness answers—I own twenty-seven one-hundredths of it.

In answer to interrogatory 14—What amount of stock in the Eastern Oregon Land Company do you own?

The witness answers—I own 2,700 shares in the capital stock of 10,000 shares.

In answer to interrogatory 15—For what purpose was the Eastern Oregon Land Company organized?

The witness answers—It was organized for the purpose of acquiring this land grant from the then individual owners, who were mostly residents of California, and this was done in order to facilitate the transaction of business.

In answer to interrogatory 16—State why, and upon whose advice Edward Martin and yourself first purchased the stock of The Dalles Military Road Company before taking the deed to the property?

The witness answers—Upon the advice of Winans & Belknap, attorneys, we purchased all the stock of The Dalles Military Road Company, with the understanding that it carried with it the ownership of the land grant, for which a deed prepared by Winans & Belknap was subsequently executed and delivered by The Dalles Military Road Company to Edward Martin.

In answer to interrogatory 17—Did The Dalles Military Road Company own any property other than this land grant?

The witness answers—No, none to my knowledge.

In answer to interrogatory 18—Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this examination, or the matter in question in this cause? If yes, set forth the same fully and at large in your answer.

The witness answers—I don't think of anything further material to the case. Edward Martin attended personally to all matters of negotiation in making this purchase, looked into the title and so on. I know that he employed Winans & Belknap to make an examination of the title when we purchased from The Dalles Military Road Company, and that he relied upon their opinion in the matter, and had not the slightest doubt that there was any question as to the title to this land grant being a good one, and he so assured me; otherwise I should not have invested my money in it. We acted in perfect good faith in the whole transaction, and believed the title to be a perfect one. I personally attended to the payment of most of one half the drafts drawn upon Edward Martin and James Phelan by P. J. Martin in connection with this matter. I have here the drafts aggregating $120,550, which was the amount furnished by Edward Martin and myself and James Phelan in January, February and March, 1875, to make the purchase of this land grant, and afterwards we paid several thousand dollars more in connection with the purchase. These are the original drafts.

[The drafts are introduced in testimony and marked by the Commissioner Exhibit "A."

In answer to cross-interrogatory 1—Did you see any part of the consideration paid for said land grant of The Dalles Military Road Company; and if so, what part, and when was it paid, and who else was present?

The witness answers—Yes; Mr. P. J. Martin drew drafts upon Edward Martin and James Phelan from time to time as he required the money to pay for the stock and land scrip of The Dalles Military Road Company, and I personally drew the checks upon the bank here to pay most of one-half of the amount of the drafts drawn by P. J. Martin, this being for the interest owned by Edward Martin and myself.

In answer to cross-interrogatory 2—Don't you know as a matter of fact that said consideration was paid for the stock of the said Dalles Military Road Company instead of the said land grant?

The witness answers—I know that the money was paid for the stock and outstanding land scrip with the understanding, of course, that it carried with it the ownership of the lands belonging to The Dalles Military Road Company.

In answer to cross-interrogatory 3—Had you at or prior to the time of said purchase of said stock ever been in the State of Oregon, or seen or inspected any of the lands included in said grant; if so, when?

The witness answers—No; I had not then or prior thereto been in Oregon.

In answer to cross-interrogatory 4—If you say you obtained the opinion of an expert of the character and value of said land before purchasing the same, please give the name of said expert and state whether he made any written report; and if so, annex the same to your deposition, or if you have it not, state what has become of it, and state where the said expert is at this time, if you know?

The witness answers—Edward Martin gave this matter his particular attention; I did not; and he kept in his possession this opinion and other papers connected with the purchase. What became of it I really do not know, nor do I remember the name of the expert.

In answer to cross-interrogatory 5—Have you ever at any

time examined the lands included in said grant, or are you in any way familiar with the value of lands of the character of those included in said grant?

The witness answers—No: I have never examined these lands. My knowledge of their value is acquired from the reports of others who have examined them.

In answer to cross-interrogatory 6—If you say you had an abstract or an examination of the title of said land made before purchasing the stock of said company, please state fully who made and furnished said abstract, and whether any certificate of title was made or furnished you, if any, when, and if so, where is the abstract or certificate of title, and if you have them, or either of them, please annex them as a part of your deposition in this case?

The witness answers—Winans & Belknap made an examination of the title for Mr. Martin. We have printed copies of an abstract submited to them—what became of the original I don't know, as Mr. Martin attended to all this business.

In answer to cross-interrogatory 7—If you say you submitted the question as to whether or not the title to the land was good in said company to attorneys, and obtained their opinions in reference thereto, state who said attorneys were, whether they gave any written opinion, and if so, where is said opinion; if you have it, produce it, and annex it to your deposition in this case?

The witness answers—Winans & Belknap were the attorneys who examined the title for us. I have only printed copy of abstract submitted to them; don't know whether they gave a written opinion or not, as Edward Martin attended to this.

In answer to cross-interrogatory 8—Had you at any time prior to the purchase of the stock of said Dalles Military Road Company ever seen the certificate of the Governor as to the construction or completion of said road; if so, where did you see them and when was it, and who else were present?

The witness answers—No: I presumed the Governor's certificate had been filed with the Secretary of the Interior; I may have seen the copy contained in the abstract referred to; I presume I did, though I don't remember; Edward Martin attended to this and I relied altogether upon him.

In answer to cross-interrogatory 9—Was not, as a matter of

fact, the whole transaction of the purchase of the stock of The Dalles Military Road Company left to P. J. Martin, and did he not act as agent in said matter for Edward Martin and your associates in the purchase of said stock?

The witness answers—The purchase of the stock and land grant was conducted by P. J. Martin as our agent, under instructions from Mr. Edward Martin.

In answer to cross-interrogatory 10—Have you any personal knowledge as to whose advice Edward Martin rested upon in the purchase of said stock, or as to whether or not the said Dalles Military Road Company owned any other property than the land grant in question?

The witness answers—Yes: I know that Mr. Edward Martin acted upon the advice of Winans & Belknap, and so far as I know, The Dalles Military Road Company owned no other property except this land grant.

In answer to cross-interrogatory 11—How much money did you advance or furnish for the purchase of the stock of the said Dalles Military Road Company, and to whom did you furnish the same, and where was it?

The witness answers—I furnished one-fourth of the whole amount paid for the purchase of The Dalles Military Road Company stock and land grant. This money I paid, as I have before said, by checks upon the bank here.

D. V. B. HENABIE.

Subscribed and sworn to before me this 16th day of September, 1891.

L. S. B. SAWYER,
Commissioner, etc.

D. P. BELKNAP, being first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in answer to the interrogatories and cross-interrogatories, deposes and says as follows:

In answer to interrogatory 1—State your name, age, residence and occupation?

The witness answers—My name is David P. Belknap: I am 66 years old: I reside in Sausalito, Marin County, California: I am a lawyer by occupation at San Francisco.

In answer to interrogatory 2—What was your business and

of what firm, if any, were you a member in 1874, 1875 and 1876?

The witness answers—I was a lawyer in 1874, 1875 and 1876, of the firm of Winans & Belknap, practicing in San Francisco.

In answer to interrogatory 3—Did you or your firm ever examine an abstract of title to the land grant of The Dalles Military Road Company, in Oregon, for Edward Martin and others, and give an opinion as to that title: if so, when was it, and was the opinion you gave them in regard to the title to that land being good or otherwise?

The witness answers—Our firm, Winans & Belknap, did examine such an abstract of title in 1874 or 1875 at the request of Edward Martin, and we gave him our opinion as to the title of this land, which was that from the information we had received from him and from an examination of the abstract of title the title was good, and that he could safely purchase.

In answer to interrogatory 4—Was there anything in the abstract examined by you, if you examined one, or in any of the papers relating thereto submitted to you, to indicate that there had been any fraud used in the construction of said road, or in obtaining the certificate of the Governor of Oregon as to its construction and completion, or in any other manner connected with obtaining said land grant?

The witness answers—There was nothing in the abstract, or in any of the matters connected with the title to indicate that there was or had been any fraud used in the construction of The Dalles military road or in obtaining the certificate of the Governor of Oregon as to its construction and completion, or in any other manner connected with obtaining the land grant. There was no intimation, suspicion or thought of any fraud whatever.

In answer to interrogatory 5—Did Edward Martin or his associates rely upon the opinion of yourself or your firm as to the title of said land in deciding whether or not to purchase said land?

The witness answers—He did and they did.

In answer to interrogatory 6—Do you know, or can you set forth any other matter or thing which may be a benefit or ad-

vantage to the parties at issue in their cause, or either of them, or that may be material to the subject to this, your examination, or the matter in question in this cause. If yea, set forth the same fully and at large in your answer?

The witness answers—Edward Martin was a very thoughtful, shrewd man, especially in the matter of purchasing lands, and he would never act in such matters until he had made the most careful examination or inquiry, and had ascertained that everything was right and safe. We had been his lawyers for years and knew his peculiarity in this respect.

In answer to cross-interrogatory 1—If you say that you or your firm have examined any abstract of title to the land grant to The Dalles Military Road Company, in Oregon, for Edward Martin and others, and gave an opinion as to that title, state whether or not such opinion was in writing, or whether or not you furnished any certificate as to title, or any written opinion or statement in regard thereto?

The witness answers—My recollection is, that the abstract was in writing; our opinion was not in writing, nor did we furnished any certificate as to title; we simply gave Edward Martin for himself and his associates an opinion verbally; that from the abstract and information he furnished and which seemed to us to be ample and to cover the whole matter, we believed the title was good and that he could purchase the property with safety.

In answer to cross-interrogatory 2—If you say you did give a written opinion or certificate of title, state whether you have or retained any copy thereof; if so, please produce it and attach it to your deposition in this case?

The witness answers—As I have stated, we gave only a verbal opinion, and this was usual with us in most cases and in all cases of Edward Martin. We had many cases of land purchased for him in the course of years, and I do not remember that we ever gave him a written report or certificate or opinion upon the title to any lands in which he was interested.

In answer to cross-interrogatory 3—State who employed you to examine said abstract, if you did examine it, and all that was said to you in reference to said land grant and the title to the Dalles Military Road Company to said lands?

The witness answers—Edward Martin employed us to look

into the matter generally, and pass upon the title and advise him. At this late date I can't remember any specific language used. We had a number of conferences about the matter, Mr. Winans, Mr. Edward Martin and myself, and what was said to us in reference to the said land grant and the title of The Dalles Military Road Company to said land was, what was set forth in said abstract. Mr. Martin expressed himself as being informed that the road had been constructed, and in conformity to the requirements of the grant. Mr. Winans died in March, 1887, and up to that time the matter of the title of these lands had not been before us for any further examination.

In answer to cross-interrogatory 4—Do you know what became of the abstract that you examined, and by who it was made or signed if you know, and did said abstract have in it the act of Congress making said grant and the act of the legislature of Oregon and the certificates of the Governor's mentioned in the bill in this case. State as near as you can what the contents of said abstract was. Did you not know at the time that you examined the said abstract that a large amount of the lands included in said grant had not been surveyed or listed or patented to the said Dalles Military Road Company?

The witness answers—I don't know what became of the abstract that Winans and I examined. I presume in due course that Edward Martin took it away when the business was finished. I don't remember by whom it was made or signed. It purported and we understood it to be a full abstract. It contained a copy of the act of Congress granting the land to the State of Oregon, and a copy of the act of the legislative assembly of the State of Oregon granting the lands to The Dalles Military Road Company, and the certificate of the Governor of Oregon that he had examined the road since its completion, that it complied with the requirements of the granting acts of Congress to Oregon, and that it was accepted, and other matters. At that time of course, a portion of the lands had not been surveyed or patented or listed to The Dalles Military Road Company, as was well known.

In answer to cross-interrogatory 5—Did you, in your examination as to the titles and rights of said company in and to said land grant, make any inquiries to ascertain whether or not, as a matter of fact, said company had constructed or completed

the wagon road provided for in the said act of Congress, or did you advise or instruct Edward Martin or his associates to make any such inquiries or research or examination?

The witness answers—We were informed by our client, Mr Edward Martin, that the said Dalles Military Road Company constructed or completed the wagon road provided for by the said act of Congress which he had learned from his own inquiries and examinations. At that time there was no doubt or contest raised as to the construction and completion of the road by anybody that we or Mr. Martin knew of. If there had been he would have told us of it, as he was so cautious and particular a man in all business matters, and especially in regard to the real estate

In answer to cross-interrogatory 6—Did you not explain to Edward Martin or his associates at the time you examined the said abstract of title and gave an opinion in reference to it, if you say you did so that the said land grant was a conditional one, and that the lands would have to be earned by a compliance with these conditions on the part of The Dalles Military Road Company.

The witness answers—That was a matter that was well understood by all parties; and it was also understood from full inquiries that the conditions of the land grant had been complied with by The Dalles Military Road Company, and that the Company was entitled to a patent or patents for the land and for the whole of it.

In answer to cross-interrogatory 7—Did you not know at the time you examined the said abstract and gave an opinion, if you did do so, that as to all that portion of said land grant for which patents had not been issued, the legal title was still in the Government of the United States?

The witness answers—We knew that the legal title of the unpatented portion of the lands had not been passed away by the Government of the United States except by its act granting the lands to the State of Oregon for the purpose of securing the construction of the military road.

In answer to cross-interrogatory 8—Did Edward Martin or any of his associates express any hesitation as to the advisability of making said purchase, or come to Oregon, either of them, to make any further investigation in reference thereto?

The witness answers—They did not express any doubt or hesitation as to the advisability of making said purchase. They had their agents in Oregon, and I always understood that they had made all the investigation that was necessary.

In answer to cross-interrogatory 9—State all that was said by Edward Martin to you in reference thereto?

The witness answers—I can't remember all or half that was said by Edward Martin about the matter; I remember only generally to this purport: that he had ascertained that the road had been constructed; that the Governor of Oregon had so certified that the said acts of Congress and of Oregon had been complied with, and that if we, as his counsel, were satisfied with the title, he would make the purchase. Our advice was that to save all questions and as a matter of prudence in many respects he should purchase the entire capital stock of The Dalles Military Road Company, which I understood was done.

DAVID P. BELKNAP.

Subscribed and sworn to before me this 16th day of September, 1891.

L. S. B. SAWYER,
Commissioner, etc.

JAMES PHELAN, being first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in answer to the interrogatories and cross-interrogatories, deposes and says as follows:

In answer to interrogatory 1—State your name, residence and occupation?

The witness answers—My name is James Phelan, I reside at San Francisco, California, and am a capitalist by occupation.

In answer to interrogatory 2—Where did you reside in the years 1874, 1875 and 1876?

The witness answers—In San Francisco, California.

In answer to interrogatory 3—Were you acquainted with Edward Martin during those years?

The witness answers—I was.

In answer to interrogatory 4—Were you a party to the purchase of the land grant of The Dalles Military Road Company, in Oregon; and if so, what interest did you purchase; state all the circumstances connected with the purchase fully?

The witness answers—I was a party; owned a half interest in the original purchase. The attention of Edward Martin and myself was called to this matter by a Mr. Hogg, from Oregon. We were led to believe it was a desirable purchase. We then corresponded with Edward's brother, P. J. Martin, who resided in Portland, Oregon, and who had been on a portion of the land in question, and he confirmed us in the belief that it would be a good investment.

In answer to interrogatory 5—What did you pay for your interest in the land, and what was the whole consideration paid by all the purchasers?

The witness answers—I paid for my interest one-half of the whole amount of consideration paid, which was $125,000 or thereabouts.

In answer to interrogatory 6—How did you dispose of your interest in the land, and what consideration did you receive for it, if you sold it?

The witness answers—I sold my interest to Edward Martin for about what it cost me.

In answer to interrogatory 7—How was this consideration paid?

The witness answers—He gave me his note for $50,000 and cash for the balance.

In answer to interrogatory 8—Did you, at or before you purchased your interest in this land know or have any notice of any fraud having been used in the construction of The Dalles military road, or in procuring the certificate of the Governor of Oregon as to its construction and completion, or in procuring parts of said lands to be listed by the Secretary of the Interior, or in procuring patents to be issued for part of said land by the President, or any other matter connected with said land grant?

The witness answers—No; I purchased in perfect good faith.

In answer to interrogatory 9—Did you at that time have any information that would lead you to believe or suspicion that fraud had been practiced in any of said matters, or had you heard any one claim that fraud had been so used or practiced?

The witness answers—No.

In answer to interrogatory 10—Have you now any interest in said land grant, or in this suit?

The witness answers—No: I have not.

In answer to interrogatory 11—Have you ever, before or since the purchase, examined this land. If so describe it: state whether it is level or mountainous, and what proportion of it is rocky, and what portion is susceptible of cultivation?

The witness answers—Yes; since the purchase I have been all over the land, the bulk is mountainous and rocky, a very small portion of it is susceptible of cultivation.

In answer to interrogatory 12—Was the price paid to The Dalles Road Company for the land the full value of the land at that time, or otherwise?

The witness answers—I consider that we paid a great deal more than it was worth at that time.

In answer to interrogatory 13—Did you ever, before purchasing, have an abstract of the title of this land made and submitted to attorneys, if so, when was it, and who were the attorneys, and what was their opinion as to the title?

The witness answers—We did, and Mr. Martin submitted the abstract for us to his attorneys, Winans & Belknap. This was before we purchased any of the stock. I do not remember the exact date when these attorneys reported the title good.

In answer to interrogatory 14—Would you have purchased any interest in this land if you had thought there was any question as to its title, or if you had known of any fraud in connection with obtaining it from the Government?

The witness answers—No; I certainly would not.

In answer to interrogatory 15—Did Edward Martin at the time he purchased his interest in said land, to your knowledge, have any reason to believe that fraud had been practiced in the construction of said road, or in obtaining the said Governor's certificate, or in any way in connection with said land grant?

The witness answers—No.

In answer to interrogatory 16—Did you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to this your examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer?

The witness answers—So far as I am concerned, I know that I purchased the property in connection with Edward Martin in perfect good faith, being satisfied that the title was perfect, and believing that the land was worth what it cost. I believe that Mr. Edward Martin had the same opinion of the title and the value of the property. But on a thorough and careful examination of the property in 1876, some time after I had bought it and paid my money, I became disgusted and determined to get rid of it, for the reason that I in my opinion deemed it worthless to hold as an investment. I came to this conclusion after spending six weeks of my time in examining the property, crossing and re-crossing it at different points and in all directions, from beginning to end.

In answer to cross-interrogatory 1—Don't you know as a matter of fact that the consideration paid by Edward Martin and yourself and others was paid for the stock of The Dalles Military Road Company, and did not Edward Martin and yourself and associates first buy up the stock of the company and pay the consideration money, whatever it was, for said stock in said company?

The witness answers—We bought the stock first, but we did so because we knew it represented the land owned by the said Dalles Military Road Company.

In answer to cross-interrogatory 2—When was it you disposed of your interest in the said Dalles Military Road Company or its land grant, and to whom did you sell out?

The witness answers—I sold my interest to Edward Martin in the year 1876.

In answer to cross-interrogatory 3—If you say the consideration for which you sold was paid by note or other obligation, state whether or not said note or obligation has been paid off; and if so, by whom and when, and how much was paid?

The witness answers—The consideration was paid part in cash and part by note for $50,000, which was paid by installments, some by Edward Martin in his lifetime, and the balance by his administratrix. The note has been fully paid.

In answer to cross-interrogatory 4—If you say you furnished any part of the consideration for the purchase of the stock of said Dalles Military Road Company, state what part

of the money you furnished, and to whom you furnished it, and when was it?

The witness answers—I furnished one-half; it was in 1875; perhaps some in the latter part of 1874. We paid the drafts of P. J. Martin for the purchase money at different times and in different sums.

In answer to cross-interrogatory 5—Had you at or prior to the time of the purchase of said stock been in the State of Oregon, or ever seen the lands included in the land grant of said company, or have any personal knowledge as to the character or value of said lands: state fully what inquiries you made to ascertain whether or not any fraud had been used in the construction of the road of the said Dalles Military Road Company, or in procuring certificates of the Governor of Oregon of said completion, and what investigation, if any, you made as to the title of said company to said land grant or its rights therein?

The witness answers—Before the purchase I had been in Oregon, but had not seen the lands. I had been there on other business. I made no inquiries about fraud. I had never heard of fraud, and never suspected any, nor had any reason to suspect fraud. Mr. Martin had the title examined by his attorneys, and they reported it good, and I was satisfied.

In answer to cross-interrogatory 6—Did you not as a matter of fact leave the whole matter of said purchase to Edward Martin without having any personal knowledge in reference to the matter?

The witness answers—I left it very much with Edward Martin, but of course we both depended very much on the report of P. J. Martin.

In answer to cross-interrogatory 7—Why was it you sold out your interest in said Dalles Military Road Company and its land grant to Edward Martin, and when was it?

The witness answers—Because I did not like the land after I examined it in person, and did not find it as good as I was led to believe.

In answer to cross-interrogatory 8—Had you ever bought or sold any land in the vicinity of the land grant of The Dalles Military Road Company, and have you any special knowledge as to the value of lands in that vicinity?

The witness answers—I have never sold any, except the sale to Edward Martin, I have no special knowledge as to the value of land in that vicinity.

In answer to cross-interrogatory 9—Describe particularly the portion of the lands included in said grant you have examined, if you have examined any portion thereof?

The witness answers—I examined the land of The Dalles Military Road Company commencing at The Dalles, and ending at Snake River. As I said in my direct examination, the bulk is mountainous and rocky. A very small portion of it is susceptible of cultivation.

In answer to cross-interrogatory 10—If you say that before purchasing you had an abstract of the title of the said land made and submitted to attorneys, state who made or furnished the said abstract of title, and where it is, and if you have it or can procure it, please produce it and attach it to your deposition in this case. Was there attached to said abstract any certificate as to the title of the said company to said lands?

The witness answers—I do not know who made the abstract; I do not remember who furnished it; I do not remember if any certificate was attached to it.

In answer to cross-interrogatory 11—If you say said abstract was submitted to attorneys, state who said attorneys were, and whether they furnished any written opinion as to the title—certificate thereof. If so, please state where it is, and if you have it, produce it and attach it to your deposition in this case?

The witness answers—The attorneys were Winans & Belknap; I do not remember whether their opinion was verbal or written; I do not know what has become of it; I believe it was a verbal opinion.

In answer to cross-interrogatory 12—Did not P. J. Martin act as the agent of yourself and Edward Martin and associates, in purchasing the stock of said company, and in acquiring your interest therein?

The witness answers—He did.

The witness here introduces a copy of the note given him by Edward Martin which has since been paid off, which is marked Exhibit "B," and attached to this deposition.

JAMES PHELAN.

Subscribed and sworn to before me this 17th day of September, 1891.

L. S. B SAWYER,
Commissioner, etc.

EXHIBIT A.

D. V. B. HENARIE, L. S. B. SAWYER, Com'r

$5,000. Portland, Jany. 5, 1875.

At sight pay to the order of James Steel, Cashier, Five thousand dollars in United States Gold Coin, value received, and charge the same to account of P. J. Martin
7775 To James Phelan, San Francisco.

Endorsements: Pay Donohoe, Kelly & Co., or order, for collection on account of First National Bank, Portland, Oregon. James Steel, Cashier.

Donohoe, Kelly & Co., pp J. W. Flood.

---

$10,000. Portland, Ogn., Jany. 8th, 1875.

At sight pay to the order of E. Martin & Co. ten thousand dollars, in United States Gold Coin, value received, and charge the same to account of as per telegram hereto attached
7796 To Edward Martin & or James Phelan, San Francisco, Cal. P. J. MARTIN.

Endorsements: E. MARTIN & Co.,

Pay Donohoe, Kelly & Co, or order for collection on account of First National Bank, Portland, Oregon. JAMES STEEL, Cashier.

Donohoe, Kelly & Co., pp J. W. Flood.

---

$5,000. Portland, Jan. 11th, 1875.

At five days sight pay to the order of Edwin Russell, five thousand 00/100dollars value received and charge the same to account of P. J. MARTIN.

U. S. Int. Rev. 11-1-75. To Edward Martin, Hibernia Bank San Francisco.

P. J. M. Two Cents. Accepted, Edward Martin, Jany 18, 1875. Paid Jany 23, 1875.

Endorsements. Pay Bank of British Columbia or order,

EDWIN RUSSELL,

Bank of British Columbia, San Francisco, Jan. 23, 1875.

WALTER YOUNG, Teller.

---

$3,350. Portland, Jan. 4th, 1875.

At five days sight pay to the order of Henry Hewett, thirty-three hundred and fifty 00/100 dollars, value received and charge the same to account of P. J. MARTIN.

U. S. Int. Rev. P. J. M. Jan. 18, '75 Two Cents.

To Edward Martin, Hibernia Bank, San Francisco.

Accepted, San Francisco, Jan, 26, 1875, Edward Martin.

(Paid Feb. 1, 1875, D. K. & Co.,) (Paid Feb. 1, 1875, D. K. & Co.)

Endorsements: Henry Hewett J. Bachman.

Pay Donohoe, Kelly & Co., or order, for collection on account of First National Bank, Portland, Oregon.

James Steel, Cashier.

Donohoe, Kelly & Co., pp J. W. Flood.

---

$2,300. Portland, Jany 15th, 1875.

At sight pay to the order of E. Martin & Co., two thousand three-hundred dollars, in United States Gold Coin, value received, and charge the same to account of purchase of D. M. W. R., stock. P. J. MARTIN.

8030

To James Phelan or E. Martin, San Francisco.

Paid Jany 26th, 1875.

Endorsements: E. Martin & Co., James Steel, Adm. Estate of Jno. S. Walker, Decd.

Pay Donohoe, Kelly & Co., or order, for collection, on account of First National Bank, Portland, Oregon. James Steel, Cashier.

Donohoe Kelly & Co., pp J. W. Flood.

$10,000. Portland, Jany 15, 1875.

At sight pay to the order of E. Martin & Co., ten thousand dollars in United States Gold Coin, value received and charge the same to account of purchase of D. M. W. R. stock. P. J. MARTIN.

8026

To James Phelan or Edward Martin, San Francisco.
Paid Jany 26th, '75.

Endorsement: E. Martin & Co. Pay Donohoe, Kelly & Co., or order, for collection on account of First National Bank, Portland, Oregon.
James Steel, Cashier.
Donohoe, Kelly & Co., pp J. W. Flood.

---

$5,600 Portland, January 21, 1875.

At sight please pay to the order of M. Sellar, five thousand six hundred 00/100 dollars value received, and charge the same to the account of P. J. MARTIN.

53

U. S. Int. Rev.
P. J. M.
Jan. 21, 1875.
Two cents.

To Edward Martin and James Phelan,
Hibernia Bank, San Francisco.
On act. D. M. W. R. Co. Pay at sight, P. J. Martin.
Paid ½ each, February 2, '75, Phelan, $2,800; Martin, $2,800, $5,600.

Endorsements: M. Seller, pay account W. C. Thompson, Cashier, or order, for collection on account of First National Bank, Portland, Oregon, Henry Failing, Pr. Nat. Gold Bank & Trust Co. S. F. Feb. 2, 1875.
D. W. C. Thompson, Cr. Sands. $5,600.

---

$5,300. Portland, Jan. 22, 1875.

At five days sight pay to the order of M. S. Burrell, fifty-three hundred 00/100 dollars value received and charge the same to account of P. J. MARTIN.

U. S. Int. Rev.
P. J. M.
Jan. 22, 1875.
Two cents.

To Edward Martin and James Phelan,
Hibernia Bank, San Francisco.
On acct. of D. M. W. R. Co. Accepted San Francisco, Jan'y 30, 1875.
Paid Feb'y 4, 1875. EDWARD MARTIN.

Endorsements: Pay to order of Thos. Brown, Cashier the M. S. Burrell, acct. Knapp, Burrell & Co.

---

$10,000. Portland, Og'n, Jan. 27th, 1875.

At sight pay to the order of E. Martin & Co., ten thousand dollars, in United States Gold Coin, value received, and charge the same to account of Purchase of D. M. W. E. Co. stock. P. J. MARTIN.

55

To James Phelan & or E. Martin, San Francisco.

(Paid Feb. 4, 1875, Nat. Gold Bk. & Trust Co.)

Paid Feb. 4, 1875.

Endorsements: E. Martin & Co. pay D. W. C. Thompson, Cashier, or order, for collection on account of First National Bank, Portland, Oregon. James Steel, Cashier Nat. Gold Bank & Trust Co. S. F. Feb. 4, 1875. D. W. C. Thompson, Cr. pr. Sands.

---

$15,000. Portland, Feb'y 2d, 1875.

Five days after sight pay to the order of E. Martin & Co., fifteen thousand dollars, in United States Gold Coin, value received, and charge the same to account of purchase of D. M. W. R. Co. stock.

No. 8686.

P. J. MARTIN.

To James Phelan or E. Martin San Francisco.

Accepted Feb'y 10th, 1875, Edward Martin.

(Paid Feb. 15, 1875, Nat. Gold Bk. & Trust Co.)

Endorsements: E. Martin & Co., pay D. W. C. Thompson, Cashr., or order for collection on account of First National Bank, Portland, Oregon.

JAMES STEEL, Cashier.

(Paid Feb. 15, 1875, Nat. Gold Bk. & Trust Co.)

---

$15,000. Portland, Feb'y 2d, 1875.

Ten days after sight pay to the order of E. Martin & Co., Fifteen thousand dollars, in United States Gold Coin, value received, and charge the same to account of purchase of D. M. W. R. Co. stock.

No. 8687.

P. J. MARTIN.

To James Phelan or E. Martin, San Francisco.
Accepted Feb'y 10th, 1875. Edward Martin.
(Paid Feb. 20, 1875, Nat. Gold Bk. & Trust Co.)
Endorsements: E. Martin & Co. Pay D. W. C. Thompson, Cash'r, or order for collection on account of First National Bank, Portland, Oregon.
JAMES STEEL, Cashier.
(Paid Feb. 20, 1875, Nat. Gold Bk. & Trust Co.)

---

$24,000. Portland, February 11th, 1875.

On the first of March next, without grace, pay to the
No. order of E. Martin & Co. twenty-four thousand dollars
8697. in United States Gold Coin, value received, and charge the same to account of purchase of D. M. W. R. Co. stock.

P. J. MARTIN.

To James Phelan or E. Martin, San Francisco, Cal.
Accepted February 18, 1875.

EDWARD MARTIN.

(Paid Mar. 1, 1875, Nat. Gold Bk. & Trust Co.)
Endorsements: E. Martin & Co. Pay D. W. C. Thompson, cash or order, for collection on account of First National Bank, Portland, Oregon.
JAMES STEEL, Cashier.

---

$5,000. Portland, March 3d, 1875.

At sight, please pay to the order of E. Martin & Co.
Stamp. five thousand 00/100 dollars, value received, and charge the same to the account of

P. J. MARTIN.

On account of D. M. R. W. Co. stock.
To Messrs. E. Martin and James Phelan, San Francisco.
Endorsements: E. Martin & Co.

---

$5,000. Portland, March 12th, 1875.

At five days sight pay to the order of
U. S. Int. Rev. Schwabacker Bros. five thousand 00/100 dol-
P. J. M. lars, value received, and charge the same to the
March, 1875. account of
Two cents.

P. J. MARTIN.

To Ed. Martin and James Phelan, San Francisco.

Accepted, San Francisco, March 17, 1875.

EDWARD MARTIN.

(Note teller London & S. F. Bank, L'd, March 22, 1875.)

Endorsements: Schwabacker Bros.

San Francisco, Sept. 14, '91.

Drafts paid:

1875.

| | | | | | |
|---|---|---|---|---|---|
| Jan. | 5, | Favor of | James Steel, cashier, | to Jas. Phelan, | $5,000 |
| " | 8, | " " | E. Martin & Co. | " E. M. & J. P. | 10,000 |
| " | 11, | " " | Edwin Russell | " E. M. | 5,000 |
| " | 14, | " " | Henry Hewitt | " E. M. | 3,350 |
| " | 15, | " " | E. Martin & Co | " J. P. & E. M. | 2,300 |
| " | 15, | " " | " | " " | 10,000 |
| " | 21, | " " | M. Sellar | " E. M. & J. P. | 5,600 |
| " | 22, | " " | M. S. Burrell | " " | 5,300 |
| " | 27, | " " | E. Martin & Co. | " J. P. & E. M. | 10,000 |
| Feb. | 2, | " " | " | " " | 15,000 |
| " | 2, | " " | " | " " | 15,000 |
| " | 11, | " " | " | " " | 24,000 |
| Mch. | 3, | " " | " | " E. M. & J. P. | 5,000 |
| " | 12, | " " | Schwabacker Bros. | " " | 5,000 |

Total.....$120,550

Endorsed drafts drawn by P. J. Martin in 1875 upon E. M. and J. P., $120,550.

EXHIBIT B.

L. S. B. Sawyer, Commissioner, etc.

James Phelan.

$50,000.00. San Francisco, April 14th, 1876.

Four years after date, for value received, I promise to pay to James Phelan, or order, the sum of fifty thousand dollars in Gold Coin of the United States, of the present standard of fineness, together with the interest thereon at the rate of ten per centum per annum, payable semi-annually on the 14th day of April and October in each year during said period in like Gold Coin, and I agree that should said interest be not paid at maturity that it shall be added to the principal and bear interest at the same rate until paid, and that should said interest

be unpaid for ninety days at any time when the same should have been paid that the payee or the holder thereof may, at his option, consider this as immediately due and payable; and in case of suit being brought, that the payee or holder hereof may recover one per cent in addition to the principal and interest then due as counsel fees to be included in said judgment. I reserve to myself the right to pay the said principal, some or any part of it, not less than $10,000, on giving the payee or holder hereof thirty days prior notice of my intention to make any such payment.

Copy signed by

EDWARD MARTIN.

This note has been fully paid up.

"E. M."

Endorsements on back:

| | |
|---|---|
| Oct. 14, 1876, paid on within principal | $10,000.00 |
| " " " interest | 2,500.00 |
| EDWARD MARTIN. | |
| April 14, 1877, paid on within principal | 10,000.00 |
| " " " interest | 2,000.00 |
| EDWARD MARTIN. | |
| March, 27, 1878, paid interest to 14th of October. | |
| " " " | 1,500.00 |
| E. MARTIN. | |
| January 16th, 1880, paid on account of principal and interest | 6,000.00 |
| October 4, 1881, paid interest per statement | 6,087.60 |
| May 16, 1882, paid interest per statement | 1,978.50 |
| " " " paid on account of principal | 10,000.00 |
| Interest to be reduced to 8 per cent on 14th of April, 1879. | |
| March 1, 1884, paid interest to March 1, 1884, 21½ months, at 6 per cent | 2,150.00 |
| March 1, 1884, paid on account of principal | 5,000.00 |
| March 25, 1884, paid principal and interest in full this day | 15,062.50 |

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco. } ss.

This certifies that I, Lorenzo S. B. Sawyer, special Commis-

missioner herein, by virtue of the foregoing commission, to me directed, caused the above named D. V. B. Henarie, David P. Belknap and James Phelan, the deponents therein mentioned, to come before me in San Francisco, in said County of San Francisco, on the 14th, 16th and 17th days of September, A. D. 1891, between the hours of 10 o'clock A. M. and 6 P. M. of said days, the said D. V. B. Henarie, David P. Belknap and James Phelan, being then and there duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in answer to the several interrogatories and cross-interrogatories thereto annexed, gave the foregoing answers, and that said answers were taken down in shorthand by Clement Bennett, a stenographer, reduced to typewriting, and then carefully read by said D. V. B. Henarie, David P. Belknap and James Phelan, and then by them subscribed in my presence.

In witness whereof, I hereunto set my hand this 17th day of September, A. D. 1891.

L. S. B. SAWYER,
Special Commissioner.

[Depositions endorsed]: Filed September 21, 1891.
R. H. LAMSON, Clerk.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker and the Eastern Oregon Land Company, defendants. } No. 1612.

DISTRICT OF OREGON, City of Portland. } ss.

On this 11th day of August, 1891, before me, at my office in the city and district aforesaid, the above entitled suit came on for the taking of testimony under equity rule 67.

Complainant appearing by F. P. Mays, United States District Attorney, and Mr. A. H. Tanner, his assistant, and the de-

fendants appearing by James K. Kelly, Esq., and Mr. A. L. Frazer, their counsel, whereupon the following proceedings were had, to wit:

GEO. N. DURHAM,
Examiner.

C. N. THORNBURY, being called as a witness in behalf of the defendants, and duly sworn, testifies as follows.

DIRECT EXAMINATION.

Questioned by Mr. Frazer:

Q 1. You may state your name, age, place of residence and occupation?

A. C. N. Thornbury; age, 64; residence, The Dalles, Wasco County, Oregon; occupation, County Judge of Wasco County.

Q. 2. How long have you resided at The Dalles?

A. About 20 years.

Q. 3. What was your business between the years 1874, 1875 and 1876?

A. In 1874 I was merchandising in Grant County; from June 15th, 1875, for 12 years I was receiver in the United States Land Office at The Dalles.

Q. 4. Were you connected with the company known as The Dalles Military Road Company at that time?

A. I was.

Q. 5. What connection, if any, did you have with that company, and when was it?

A. February 7th, 1876, I was elected Secretary of that company.

Q. 6. What was the occasion of your being elected Secretary of that company?

A. At a meeting of the stockholders elected directors at that time, when or about that time the property changed hands.

Q. 7. Into whose hands was it transferred, or to whom was it sold?

A. The property was sold to Edward Martin, of San Francisco.

Q. 8. Do you know what the consideration paid by Mr. Martin was on that sale?

A. The consideration was one hundred and twenty-five thousand dollars.

Q. 9. Do you know whether or not a deed was made from the company to Mr. Martin.

A. There was a deed made by the company to Edward Martin.

Q. 10. About what date?

A. The deed is dated May 31st, 1876.

Q. 11. State, if you know, whether Mr. Edward Martin purchased that land in good faith?

A. Yes; Mr. Edward Martin purchased that land in good faith.

Q. 12. State if, to your knowledge, Mr. Edward Martin at or prior to the time of his purchase of this land, had any knowledge of any fraud in procuring the Governor's certificate set out in the bill herein, or any knowledge that there was any fraud in the construction of the Dalles military road or that this road was not constructed, or any information that would lead him to suppose that there was any such fraud or want of construction, or any means of acquiring such information?

A. He had no such information to my knowledge.

Q. 13. Were you pretty well acquainted in the neighborhood of The Dalles along the line of the Dalles military road at that time?

A. I was; I had resided in Grant County before that time, on the line of this road.

Q. 14. I think you said your business there had been post-trader or merchandising?

A. I was Post Trader at Camp Watson and also had mercantile business in Canyon City.

Q. 15. Now you may state if, to your knowledge, at the time of the purchase by Martin, any other person or corporation made any claim to these lands deeded by The Dalles Military Road Company to Mr. Martin, or whether at that time to your knowledge the United States was making any claim to the land?

Q. 16. There was no other claim to the land than that of The Dalles Military Road Company to my knowledge.

Q. 17. Had there been at that time any public talk or claim of fraud in this matter of the Governor's certificate or construction of the road to your knowledge?

A. Not to my knowledge.

Q. 18. Would you have been likely to have heard it if there had been any such talk?

A. I think so.

Q. 19. Through whom was this purchase made?

A. The purchase of the stock in the first place, I think was made through Mr. P. J. Martin.

Q. 20. You may state if you know whether Mr. P. J. Martin or Edward Martin made any examination as to the title of this land before purchasing it?

A Mr. P. J. Martin did, yes sir.

Q. 21. State what examination was made, if you know?

A. I was at the Dalles during the winter that this transfer was made, that is, during the winter of 1874 and 1875. Ex-Governor Curry was there during that winter and in the spring I think about the middle of March Mr. P. J. Martin came there, and he at that time was examining the title to the land.

Q. 22. Do you know whether or not they had any abstract made of the title?

A. Not to my knowledge.

Q. 23. Did you, while you was Receiver, make an examination of the title in the United States Land Office?

A. Yes sir.

Q 24. Prior to the time of the purchase?

A. Prior to the time of the transfer of the lands by deed to Mr. Martin, but not prior to the purchase. The Land Office was not established at The Dalles until June 15th, 1875. The records arrived there before that time and they examined the records before the office was opened, I think in May.

Q. 25. Were you at that time acquainted with the lands along the line of this road within the limits of Grant County, The Dalles Military Road Company?

A. Yes sir; as far as Canyon City. I have been over the body of the road since.

Q. 26. State whether or not the price paid, $125.000.00 was then the full value of the land or otherwise?

A. At that time it was a very big price for the land.

Q. 27. What is the character of the land along the road?

A The character of the land, there is some very good agriculture land in spots, but the majority of it is very poor land, a very great majority of it.

Q. 28. What kind of land is it?

A. Well, the agricultural land is very good land; there is some very good pasture land, and there is a great deal of very rocky, dry, worthless land.

Q. 29. What proportion does the arable portion of this land bear to the rocky, worthless part?

A. I think there is not to exceed one-tenth of the land that is arable.

Q. 30. Who were the Directors of The Dalles Military Road Company at the time of the transfer to Edward Martin at the time the deed was made to him?

A. P. J. Martin, George L. Curry, O. S. Savage, William Grant; Mr. M. Sellar had been elected Director, but at that meeting sent in his resignation, he not having qualified.

Q. 31. How long had those Board of Directors been in office, do you know?

A. I think from the 7th of February until the date the deed was made, which was the 31st of May, 1876.

Q. 32. What was the occasion of their having been elected in February?

A. I think they were elected because the property having changed hands they wanted new Directors

Q. 33. You mean the stock of the company had changed hands?

A. Yes: I mean the stock of the company.

Q. 34. Did anyone, at the time of this sale to Mr. Martin or prior thereto to your knowledge, question the validity of the title of The Dalles Military Road Company, or was there any suspicion of fraud in procuring the Governor's certificate, or in any of the transactions of the company up to that time?

Objected to on the ground that it is immaterial and incompetent.

A. Not to my knowledge.

Q. 35. What opportunity had you of knowing of any such question of the validity of the title or suspicion of fraud, if there had been any such?

Same objection.

A. I resided in that country and heard a good deal of the talk of the country, and if there had been any talk of that kind I would have been liable to have heard it.

Q. 36. Do you know what the generally expressed opinion of the attorneys at The Dalles and other places on this road was in regard to the validity of the title of The Dalles Military Road Company to these lands?

Same objection.

A. I have heard attorneys at The Dalles and at Canyon City express an opinion that the title of the Dalles military road to these lands was good.

CROSS-EXAMINATION.

Questions by Mr. Tanner:

Q. 37. Were those attorneys employed by the company?

A. No sir.

Q. 38. Do you know that they ever investigated the question of the title?

A. I do not.

Q. 39. You never heard of the attorneys in either of those places expressing their opinions about the matter, did you?

A. I did not, all of them.

Q. 40. As I understand you, the stock of this company was first sold to Mr. Martin?

A. The stock in the company I think was first sold to Mr. Martin and James Phelan in San Francisco.

Q. 41. That was before the deed was made from the company to Martin, was it not?

A. I think so. I am not certain about the stock, as I have never examined the stock-book.

Q. 42. Whom did he buy this stock from, do you know these parties, Martin and Phelan?

A. I do not know. I think the original owners of the stock transferred their stock to Mr. P. J. Martin for the purpose of having it sold to Mr. Edward Martin and Mr. James Phelan.

Q. 43. How long was that before this deed was made?

A. That was in the winter of 1874-5, and this deed was made in May, 1876.

Q. 44. They took charge of the company—that is, the purchasers of this stock, soon after they had bought the stock, by electing this new board of Directors that you speak of, did they not?

A. This new Board of Directors was elected February 7, I

think, 1876; and I think that was in the spring of 1875.

Q. 45. Do you know in whose name the stock was taken or to whom it was transferred? In whose name was it put?

A. I do not.

Q. 46. Did Phelan and Martin buy all the stock at that time?

A. I think so, but I do not know.

Q. 47. Would the books of the Company show that?

A. I Think they would.

Q, 48. Where are the books of the company, do you know?

A. There at The Dalles.

Q. 49. Who is the present Secretary of the Company?

A. I am the present secretary of the company.

Q. 50. Why did you not bring the books of the company with you when you knew you were to be a witness in this case?

A. I did not think it was necessary.

Q. 51. Did these parties, Phelan and Martin, pay for this stock at the time they bought it?

A. I think so; but I did not see them pay for it.

Q. 52. Has that $125,000 you speak of ever been paid for the property?

A. I do not know.

Q. 53. Did those purchasers pay the $125,000 for the stock of this company?

A. I do not know what they paid for the stock of the company.

Q. 54. Did you see any part of the $125,000 paid?

A. I did not.

Q. 55. You do not know of your own knowledge then whether it was ever paid or not, do you?

A. I do not of my own knowledge. I did not see it.

Q. 56. Was Mr. P. J. Martin elected a director in this company, The Dalles Military Road Company, before the deed was made from the company to Martin?

A. Mr. P. J. Martin was.

Q. 57. Had Mr. P. J. Martin been up in that country before the deed was made?

A. Yes Sir.

Q. 58. Do you know whether he had ever been over the line of this alleged road or not before the deed was made?

A. He had been over part of it.

Q. 59. Which part ?

A. I went with him as far as Antelope, sixty miles, and he went on up the road, I do not know how far.

Q. 60. When was that ?

A. In June, 1875.

Q. 61. Did you go on this Dalles military wagon road.

A. Most of the way ; not all of the way.

Q. 62. What part of the way was it you went off of that road ?

A. We went off of that road to get across the Des Chutes River. We went by the Miller bridge.

Q. 63. How much of the road of this company did you avoid in going off of it in this way ?

A. I should judge about fifteen miles.

Q. 64. You went by the Miller bridge to get across the Des Chutes because there was no bridge on the line of this Dalles military road, did you not ?

A. At that time the bridge had been washed away, and there was no bridge on The Dalles military road across the Des Chutes.

Q. 65. You do not know how far on from Antelope he went, do you ?

A. Not of my own knowledge.

Q. 66. Or from anything he said to you about it ?

A. I think he told me they went to Canyon City.

Q. 67. Did he or any one representing these purchasers examine the books of the company before this purchase was made ?

A. I saw Mr. P. J. Martin examining the books.

Q. 68. Was he representing the other Martin or the purchasers ?

A. I think so.

Q. 69. You do not know whether they ever had any abstract of title, or not do you, to those lands ?

A. Not of my own knowledge. They told me they had an abstract of title.

Q. 70. You never saw it, I suppose ?

A. I have in the office printed abstracts of titles, but the

abstract of title which Mr. Martin got at that time I never saw.

Q. 71. How many stockholders were there in this company at the time the stock was bought out by Mr. P. J. Martin and Phelan?

A. By Edward Martin and Phelan.

Q. 72. How many stockholders were there at that time?

A. I do not know how many holders of stock there were at that time.

Q. 73. Were they numerous or otherwise?

A. I do not think there were a great many of the original stockholders.

Q. 74. Who were the principal stockholders; can you name them?

A. I think Mr. O. S. Savage, Mr. M. Sellar, William Grant, Dr. Mitchell. I think those were the stockholders at that time.

Q. 75. Was George Waldron a stockholder?

A. I do not know whether he was or not.

Q. 76. Was the stock all transferred to the purchasers at the same time or at different times?

A. I do not know. I think it was all transferred to them at once, but I do not know; I never examined the books in relation to it.

Q. 77. Was you secretary of the company at that time?

A. Not at the time the stock was bought.

Q. 78. Who was the secretary at that time?

A. William Grant.

Q. 79. You were not present then when any transfer of stock was made?

A. I was not.

Q. 80. At the time when you say P. J. Martin went over portions of this alleged road, was that before the purchase of this stock?

A. No, sir; it was before the making of the deed to Edward Martin, but not before the purchase of the stock.

Q. 81. Was it before the money was paid?

A. I do not know when the money was paid.

Q. 82. Was you present when the deed was delivered?

A. I was; I signed the deed as Secretary.

Q. 83. Did you see any money paid at that time?

A. I did not.

Q. 84. To whom was the deed delivered?

A. The deed was to be sent to Edward Martin.

Q. 85. Who took charge of it to send it?

A. I do not recollect; I think Mr. P. J. Martin took charge.

Q. 86. He was there at the time, was he?

A. Yes; he signed the deed.

Q. 87. Was he President of the Company at that time?

A. He was; yes, sir.

Q. 88. Who was it you said negotiated the sale of this property to Martin?

A. I think it was P. J. Martin.

Q. 89. How was the sale of this stock effected, do you know, or by whom?

A. I think Mr. P. J. Martin effected the sale of the stock to his brother, Edward Martin, and James Phelan.

Q. 90. Was P. J. Martin interested in the company at any time before the purchase of this stock.

A. I think not; I do not know.

Q. 91. Who induced P. J. Martin, or how was he induced, to take an interest in the sale of the stock?

A, I do not know.

Q. 92. Had he himself or anyone in the interest or behalf of these purchasers at any time before the purchase of this stock examined into the lands, or investigated the affairs of the company in any way that you know of?

A. I think Mr. P. J. Martin examined into the affairs of the company, but I do not know of anyone else having done so for them.

Q. 93. Was he acting for them at that time?

A. I presume so.

Q. 94. Do you know whether he was or not?

A. I do not of my own knowledge; no.

Q. 95. Up to that time he had not examined these lands, had he?

A. I think not.

Q. 96. Do you know whether anyone had gone over the lands in his behalf, and made any report to him about the character of the lands or not?

A. In Mr. P. J. Martin's behalf?

Q. 97. Yes; before he bought the stock.

A. I do not know whether they did or not.

Q. 98. If they had done so you would have been apt to know it, wouldn't you?

A. I might have known it.

Q. 99. How many shares of stock was there of this company, if you know?

A. I do not know without examining the records; I think there were a thousand.

Q. 100. What was the par value of the stock?

A. I do not recollect.

Q. 101. The only negotiations for the sale of this land to Edward Martin there was, took place, did it not, after the purchase of this stock, so far as you know?

A. I think so; yes. So far as I know, I think the negotiations of the sale to Edward Martin took place after the sale was closed.

Q. 102. Edward Martin, as you understand, was a brother of P. J. Martin?

A. Yes, he was a brother.

Q. 103. Where is he now?

A. He is dead; he died several years ago.

Q. 104. How long have you been living in The Dalles?

A. About twenty years.

Q. 105. Mr. Thornbury, do you not know as a matter of fact that there has always been more or less of contention and doubt and dispute among the people up in that country in the vicinity of this road as to the validity of that grant, and whether the lands had ever been actually earned by building the kind of road required, and so on; has it not been a matter of public talk and contention for many years?

A. I had never heard the validity of the grant questioned before about 1877 or 1878. Since that time there has been a great hubbub about it.

Q. 106. Wasn't there prior to that and at the time it was examined by the Governor: do you remember that circumstance of the Governor being up there to go over the road?

A. I recollect meeting the Governor and several other persons on Bridge Creek and traveling with them as far as Span-

ish Gulch on the road to Canyon City; and at that time I had not heard of any complaints about the titles to The Dalles military road lands.

Q. 107. Wasn't it claimed by a good many at that time that what was called the Gordon bridge was not properly built and was dangerous?

A. It might have been, but I was not in the vicinity of the Gordon bridge at that time, never crossed it, never heard much about it.

Q. 108. You knew, did you not, that the Governor did not go over the entire length of the road at that time?

A. I knew of my own knowledge that he went over the road from Bridge Creek to Spanish Gulch, and heard of him being in Canyon City, but do not know whether he went any further or not.

Q. 109. Was you living at The Dalles at that time?

A. At that time my family were at The Dalles, and I had a trading post below Camp Watson.

Q. 110. Do you remember the circumstance of there being a lawsuit between the company and Mr. C. M. Lockwood at Canyon City about this road.

A. I remember Mr. Lockwood; I do not remember any suit with him; do not recollect anything about it.

Q. 111. Do you know of any other lawsuit between anybody else and the company as to this road?

Objected to as immaterial and incompetent, unless the time is specified.

Q. 112. I mean about the time the road was claimed to have been completed and before the purchase?

A. None; no sir.

Q. 113. You do not mean to say there were no such suits, do you?

A. I do not: I do not mean to say there were no such suits; I do not know of any.

Q. 114. Wasn't it a matter of notoriety, Mr. Thornbury, at The Dalles, and was it not so talked at the time that the Governor had objected to this road on account of the Gordon bridge being unsafe, and wasn't it claimed that he would not certify to the completion of the road on that account?

A. I never heard of any such talk until the last few years;

never heard any such talk before the road was accepted by the Governor.

Q. 115. You were not living in The Dalles at that time you say?

A. No, sir; I was not living there; my family was living there; I was most of that time in Grant County.

Q. 116. Did you get any newspapers from The Dalles?

A. I did.

Q. 117. Had your company, prior to the time of this sale of the stock, attempted to sell any of the lands included in this grant?

A. Yes; I think so.

Q. 118. Had you been able to make any sales?

A. I think so; yes.

Q. 119. How many sales?

A. I do not know; I cannot tell; the books of the company will tell, but I think there were a good deal of the lands sold before that time.

Q. 120. Wasn't you troubled constantly by reason of their being doubt about the company having earned their lands, in making sales of lands. Didn't that question come up frequently?

A. Before that time I had nothing to do with the sale of lands, and did not hear the title attacked.

Q. 121. That was before you had any connection with the company, do you mean to say?

A. At what time do you mean; what date?

Q. 122. Well, you say the sale of the stock was in 1875?

A. I had nothing to do with the company at that time.

Q. 123. So you could not say, as a matter of fact, whether there were questions made about the title of the company or not, could you?

A. I could not, only from hearsay; I did not hear any questions of the title at that time.

Q. 124. When did your connection with the company first begin?

A. February 7, 1876.

Q. 125. That was after the purchase of this stock?

A. Yes.

Q. 126. Have you been making any deeds to purchasers since your connection with the company?

A. Yes.

Q. 127. What kind of deeds did you make—warranty deeds?

A. Until about three years ago (I do not recollect the date), they made bargain and sale deeds; since that time they have made warranty deeds.

Q. 128. Is that so as to any but the patented lands?

A. I think some warranty deeds have been made to lands that were listed, and the lists accepted in the local offices that have not been patented.

Q. 129. You have declined to make warranty deeds, have you not, to any of the other lands of the company; I mean those which have not been patented to the company or listed to the company, and have it approved at the local land office, as you have stated?

A. The company have not offered lands for sale until after they were listed in the local land offices at any time.

Q. 130. You say then that up to about two or three years ago the company had never made anything but bargain and sale deeds to these lands that they sold?

A. The Dalles Military Road Company made a lot of warranty deeds, Edward Martin made a lot of quit-claim deeds, and the Eastern Oregon Land Company made a lot of quit-claim deeds; but within the last several years—I do not recollect whether two, three or four—the Eastern Oregon Land Company have made warranty deeds.

REDIRECT EXAMINATION OF MR. THORNBURY.

Q. 131. When you referred to the company having made these deeds within recent years, which company did you mean?

A. I mean the Eastern Oregon Land Company.

Q. 132. Has The Dalles Military Road Company made any deeds of any nature since the sale to Edward Martin?

A. None whatever.

Q. 133. How far from The Dalles was the Governor at the time you have mentioned when you met him on The Dalles military road?

A. About 115 miles, I think.

Q. 134. In what direction did you travel from there with him?

A. On The Dalles military road towards Canyon City and from The Dalles.

Q. 135. Was he traveling on The Dalles military road when you first saw him?

A. He was.

Q. 136. You have said there was talk about the Gordon bridge not having been properly built in the last few years; had you heard any such talk at or prior to the time the deed was made by The Dalles Military Road Company to Edward Martin?

A. I do not recollect of any.

(Signed) C. N. THORNBURY.

Excused.

Attest: GEO. H. DURHAM,
Examiner.

Whereupon further proceedings herein were adjourned until next Thursday morning at 10 o'clock A. M.

---

Thursday, August 13, 1891, 10 A. M.

The parties hereto met pursuant to adjournment at my office whereupon the following proceedings were had, to wit:

P. J. MARTIN, a witness on behalf of the defendants, being, first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Frazer:

Q. 1. State your name, age, residence and occupation?

A. P. J. Martin, age 55 years, Alameda County, California; I am not engaged in any business at present; am a retired merchant.

Q. 2. Where did you reside and what was your business in the years 1874-'5 and '6?

A. In Portland, Oregon; merchant.

Q. 3. What relation are you to Edward Martin named in the pleadings herein as a purchaser of the land grant of The Dalles Military Road Company?

A. A brother.

Q. 4. State what, if any, connection you had with the purchase of said lands, being the lands described in the bill herein at that time?

A. I purchased the lands in the winter of 1874 and, 75 for him and James Phelan of San Francisco, each purchasing a half.

Q. 5. Did you act as their agent in the matter?

A. I did.

Q. 6. Just state fully how you came to make the purchase for them, and what was done in the matter?

A. In the summer of 1874, I happened to go down from here to San Francisco, and while there my brother and James Phelan asked me to see them in relation to those lands. He asked me if I knew anything about them; I told them no; and they told me they were about to purchase them; they were looking into the matter; and upon my return to Oregon, I having business in Eastern Oregon I took a trip over the road for a certain distance out of curiosity, not knowing that they were to buy them at the time; not knowing they were going to buy them. They wrote me soon afterwards about the property, and I answered them that I had been up to The Dalles and taken a run out over the property a certain distance about 40 miles, and that what I had seen of it was very nice land, very nice property. And that was all I wrote them at that time. I should have stated that while in San Francisco they had a report of the property from a chief engineer and expert who had been over it.

Q. 7. Do you remember his name?

A. His name I think was Kidder; he was a railroad man.

Q. 8. Now proceed Mr. Martin, and tell what was done afterwards?

A. Well, they determined to buy, and I acted as their agent in the purchase. I employed Ex-Governor Curry of this State at the time to go to The Dalles and investigate into the affairs of the company and purchase some of the stock of the company. While there the river froze up and it was of course impossible to get to The Dalles; so he remained there all winter and looked into the affairs of the company and reported to me that everything was correct, and I purchased the stock. I pur-

chased the land from the respective owners and paid them for it.

Q. 9. In what way did you make that purchase?

A. I bought from individuals.

Q. 10. You mean you bought the stock of The Dalles Military Road Company from individuals?

A. Yes, sir.

Q. 11. Why did you take that method of acquiring the land.

A. Well—they endeavored to buy the land—did not want the stock—wanted to buy the land, but found it was necessary to take the stock also, to make it legal and clear and perfect.

Q. 12. Did you acquire the title to all the stock in The Dalles Military Road Company?

A. I did.

Q.13. How much did you pay for that stock?

A. A little over $125,000.

Q. 14. Did you pay that money yourself?

A. Most of it; in money and in drafts on the parties in San Francisco, my brother and Mr. Phelan.

Q. 15. In whose name was this stock taken then?

A. In mine.

Q. 16. For yourself or for your brother and Mr. Phelan?

A. For my brother and Mr. Phelan.

Q. 17. When was this?

A. It was in the spring of 1875; I think it was in May somewhere along there.

Q. 18. What was then afterwards done in the matter to perfect the title in your brother and Mr. Phelan, or either of them?

A. Well, after they transferred to me we elected a new Board of Directors in The Dalles Military Road Company, of which I was elected President, and soon afterwards we executed a deed to Edward Martin, and I signed the same as President.

Q. 19. Do you remember the date of that deed?

A. I think it was May 31, 1875.

Q. 20. 1875 or 1876?

A. Yes, it was 1876; it was about a year afterwards.

Q. 21. What examination, if any, did you make or have made as to the title to these lands before purchasing?

A. We had an abstract furnished us, and that was submitted to our attorneys, and they passed the title as being perfect.

Q. 22. What attorneys were they?

A. Winans & Belknap in San Francisco, and Mr. McGraff, or McGraw, who was prosecuting attorney for this State once.

Q. 23. Do you know upon what your brother and these attorney's relied in forming their opinion as to the title to these lands?

Objected to by complainant as incompetent and immaterial.

A. They relied upon the acts of Congress relative to these grants, and more especially that of 1874 as to the issuing of patents.

Q. 24. The act of 1874 authorized patents to be issued on these lands?

A. Yes; directly to the corporation.

Q. 25. Do you know whether the Governor's certificate as to the construction of these roads constituted a part of this abstract or not?

A. It did.

Q. 26. Did the act of the Legislature of Oregon, transferring this grant to The Dalles Military Road Company also form a part?

Same objection as last, and leading.

A. Yes, sir.

Q. 27. Mr. Martin, prior to the time and at the time of your purchase of these lands for your brother and Mr. Phelan, as you have narrated, had you heard any claim or assertion that there was fraud in the construction of the Dalles military road, or in procuring the Governor's certificate, that the same had been constructed, or in procuring the President of the United States to patent part of these lands, or the Secretary of the Interior to list the same, or had you any information that would lead you to believe or suspect that there had been fraud in any of these acts?

A. None whatever; I never heard anything against the title, or anything different at the time; and I talked with a great many, and I certainly must have heard of it if there was

such a report abroad; I never heard anything going about, or anything against the title.

Q. 28. Do you know whether or not your brother, Edward Martin, ever had any information of any fraud in any of these transactions, or any information that would lead him to believe there was fraud in any such transactions, or whether Mr. James Phelan had any such information?

Objected to as immaterial and incompetent.

A. They certainly never did, or they would not have paid that amount of money for the property: would not have paid that or any other amount.

Q. 29. Where is Edward Martin now?

A. Deceased.

Q. 30. When did he die?

A. He died the 12th of May, 1880.

Q. 31. Who are his heirs?

A. He left a widow and some eight children.

Q. 32. What is the widow's name, and is she still living?

A. Yes; her name is Mrs. E. Martin.

Q. 33. Are those heirs the parties named, part of them, as defendants in this suit?

A. I think so; they are the principel heirs to this property.

Q. 34. Do you know whether or not they were minors at the time of your brother's death in 1880?

A. Yes; there were four or five of them minors; there were four minors.

Q. 35. What became of the interest of James Phelan in these lands. You said you bought them for your brother and James Phelan?

A. Soon after the first purchase for Phelan and Martin, Phelan sold out to my brother; my brother bought him out probably six months after the first purchase.

Q. 36. Your brother then held the legal title to the whole of the lands?

(Objected to as incompetent and not the best evidence.)

A. Yes, sir.

Q. 37. What other person if any had an interest in these lands, or has an interest in these lands now?

A. There is D. V. E. Henarie and the heirs, including Mrs. Martin and her children.

Q. 38. You may name them?

A. Mrs. Eleanor Martin, P. D. Martin, James V. Martin, Andrew Martin myself, P. J. Martin, Mrs. Annie Donahue, John G. Downing, Mrs. Carpentier, and that is all I remember.

Q. 39. When did you acquire your interest in these lands?

A. About six or seven years ago.

Q. 40. At the time you acquired this interest, did you have any knowledge or information that would lead you to believe there was fraud in the construction of this road in procuring the Governor's certificate?

A. Why, certainly not, or I would not have paid my coin for it.

Q. 41. How is the title to this land held now?

A. It is in the Eastern Oregon Land Company.

Q. 42. These parties you have mentioned as being owners then are stockholders in that company, are they?

A. Yes, sir.

Q. 43. When was the land transferred to the Eastern Oregon Land Company, if you remember?

A. About 1880—no, probably 1882; I really do not remember.

Q. 44. It is stated in the Exhibit here as August 11, 1884.

A. Yes that is right.

Q. 55. How great an interest have you in the property, Mr. Martin?

A. Well; I do not know what it is worth; I could not sell it for anything.

Q. 46. What portion, I mean, do you now hold?

A. I hold three hundred shares in a capital of 10,000 shares.

Q. 47. What did you pay for those 300 shares?

A. I paid about $10,000.

Q. 48. Did you pay this in good faith?

A. I did; I paid it in hard coin; paid it to John D. Wilcox here. I bought it from him.

Q. 49. How did Mr. Wilcox acquire this interest?

A. He acquired it through his wife; his wife was one of the heirs; she was a daughter of my brother; after her death it fell to him, and I bought him out.

Q. 50. Has the Eastern Oregon Land Company any other property than these lands?

A. No.

Q. 51. For what purpose was it organized?

A. Just to facilitate the sale of the property, because most of the owners were in California.

Q. 52. Now, you may state, if at the time this property was transferred to the Eastern Oregon Land Company any of the incorporators of that company or the stockholders therein to your knowledge had any information of any fraud in the construction of this road, or in the procuring of the Governor's certificate of the completion of the road, or in procuring the listing of the lands by the Secretary of the Interior, or the issuing of patents on a part of the same by the President of the United States, or any fraud whatever connected with the business?

Same objections by complainants.

A. None whatever that I ever heard of, near or remote.

Q. 53. When you bought your stock in the Eastern Oregon Land Company, what was the object you had in view?

Objected to as immaterial.

A. To make some money out of it.

Q. 54. Did you consider it in any other way than as representing so much of the land of The Dalles military road grant?

Same objections.

A. That is all.

Q. 55. Who were the principal stockholders in The Dalles Military Road Company to whom you paid this $125,000, if you remember now?

A. There was Mrs. Neoma Mitchell, wife of Dr. Mitchell, Mr. Hummason, O. S. Savage, William Grant, Senator Kelly, Macleay, of Corbitt & Macleay, Edwin Russell, of the Bank of British Columbia, Henry Hewitt, in the insurance business here, Francis, also of the Bank of British Columbia, Dr. J. C. Hawthorne, Moses Seller. That is all I think of now.

Q. 56. Where is Dr. Mitchell.

A. Dr. Mitchell is dead. But it was from Mrs. Mitchell I purchased; she resides at The Dalles, and is the wife of Skenck.

Q. 57. Where is O. S. Savage?

A. Dead.

Q. 58. William Grant?

A. At The Dalles, I guess.

Q. 59. Hunmason?

A. He is dead.

Q. 60. Kelly?

A. He is in Washington.

Q. 61. Macleay?

A. He is here.

Q. 62. Edwin Russell?

A. Dead.

Q. 63. Hewett?

A. He is here.

Q. 64. Francis?

A. He is dead.

Q. 65. Dr. Hawthorne?

A. He is dead.

Q. 66. Moses Seller?

A. He is abroad somewhere.

Q. 67. What was your object in purchasing this stock. Did you purchase it to get control of The Dalles Military Road Company, or simply as a means of procuring the title to the land.

Objected as immaterial, incompetent and leading.

A. To get the title to the land.

Q. 68. Where is Governor Curry at this time?

A. Dead.

Q. 69. Where are Winans & Belknap?

A. Judge Winans is dead; Mr. Belknap is the surviving member of the firm, and still in business in San Francisco.

Q. 70. Do you know where Mr. McGraw is?

A. I think he resides in Alameda.

Q. 71. How much of this land did you examine before purchasing the stock?

A. I went out to a place called Grass Valley, a big day's drive, and back again.

Q. 72. Have you since that time examined the remainder of the land?

A. A great part of it.

Q. 73. Now please state what is the character of this land?

A. Well, it is pretty tough; about nine-tenths of it is not worth a damn, so to speak.

Q. 74. Was this $125,000 which you paid for the land, the full value of the land at that time.

A. It was a great deal more than the value of it, as we learned afterwards when we came to find out.

Q. 75. What kind of land is it; just describe it?

A. Well, the most of it, I don't suppose you could get worse land on the top of God's earth. I think that is a notorious fact to everybody.

Q. 76. Is it mountainous?

A. Mountainous? Yes, and a desert.

Q. 77. State if you know whether the present purchasers have paid taxes on this land, or any part of it, since the date of the purchase in 1875?

A. Yes, they have paid taxes regularly.

Q. 78. Do you know what they amount to altogether?

A. I do not; I think the taxes amounted in the neighborhood of a couple of thousand dollars a year; between two and three thousand dollars a year at the present time; I am not sure though.

Q. 79. Has the Eastern Oregon Company or the first purchasers, Edward Martin and his associate, sold any considerable part of this land; if so, how much?

A. They sold some, not much; I could not tell you how much; 2,000 acres altogether, I guess.

Q. 80. Do you know whether or not the parties who purchased this part sold by them had any knowledge or notice of any fraud?

A. No, sir; they certainly did not, that I know of.

Q. 81. Then the title to the great bulk of these lands is still in the Eastern Oregon Land Company?

Objected to as immaterial and incompetent.

A. Yes, sir.

CROSS-EXAMINATION OF MR. MARTIN.

Questions by Mr. Tanner:

Q. 82. How long had you lived in Oregon at the time of the purchase of the stock of The Dalles Military Road Company?

A. From the fall of 1865 on.

Q. 83. Continuously?

A. Yes, sir.

Q. 84. Was the stock of this company all bought at the same time?

A. Within a period of a few months: within a period of perhaps two months.

Q. 85. What date was the first stock bought, if you can state the date?

A. It was some time in the winter of 1874.

Q. 86. That is the first stock?

A. Yes.

Q. 87. When was the last stock purchased?

A. It must have been purchased certainly within three months after that time; I think two, but would not be certain at this date.

Q. 88. When was the money paid for the stock?

A. It was paid for it in the spring of 1875.

Q. 89. The stock had all been transferred to you then before the money was paid, had it?

A. Yes, sir.

Q. 90. Why was that?

A. Because I purchased it and in order to close up the business of the owners at that time.

Q. 91. You had purchased it, but not paid for it, at the time they transferred it to you?

A. Oh, yes; I paid for it as it was transferred.

Q. 92. At the time?

A. Yes; they did not deliver it up until they got the money.

Q. 93. Then it was not transferred to you until some time in 1875?

A. Yes, along in the spring of 1875 from time to time, as I was able to get it; some of the stock was sold at The Dalles.

Q. 94. Did you pay for those shares of stock from these various holders as you purchased it?

A. Yes, sir.

Q. 95. Your first payment then was made some time in 1874, was it?

A. Yes, late in 1874.

Q. 96. Whom was that to?

A. I do not remember now who the individual was.

Q. 97. The money was paid then to these stockholders at different times, was it ?

A. Yes, sir.

Q. 98. How much money did you pay to Colonel Kelly for his shares of stock ?

A. Twelve thousand or twelve thousand five hundred dollars.

Q. 99. When was that paid ?

A. In the spring of 1875.

Q. 100. How much money did you pay Hummason for his shares of stock, and when was that paid ?

A. I paid him over $18,000, and it was paid in the spring of 1875.

Q. 101. How much did you pay Judge Savage for his shares of stock, and when was that paid ?

A. The same amount, and at the same time I paid Judge Kelly.

Q. 102. Where was that money paid at ?

A. In Portland, at the bank of Ladd & Tilton.

Q. 103. Who was present at that time the money was paid ?

A. They left the stock at the bank of Ladd & Tilton, and I paid the money to Ladd & Tilton and took the stock ; so that there was nobody present.

Q. 104. When was that ?

A. In the spring of 1875.

Q. 105. Had your brother ever seen any of these lands ?

A. No, sir.

Q. 106. Or Mr. Phelan ?

A. No, sir.

Q. 107. Or ever been to Oregon?

A. No, sir.

Q. 108. You say prior to the purchase of this stock you had only seen about forty miles of this alleged road ?

A. Yes.

Q. 109. That was the part from The Dalles leading out, was it, to Grass Valley ?

A. Yes, sir.

Q. 110. Did you go out with Mr. Thornbury ?

A. No.

Q. 111. Whom did you go with?

A. I do not remember whom I went with; it might have been with William Grant; I think it was William Grant, but I have forgotten. There was nobody along the road those days; that is, no settlers.

Q. 112. When was that you went over the road?

A. That was the fall of 1874; along somewhere in the fall, early.

Q. 113. Did you go to the Gordon bridge at that time?

A. No.

Q. 114. You went round the other road?

A. I went around just a little off the road by Miller's, because it was the only place; I stopped at Miller's bridge, because that was the only place one could stop and put up at and get anything to eat for man and beast. I went that way and got in on the road as near as I could and continued on.

Q. 115. How much of the road did you leave in making that circuit?

A. A few miles; I drove out to the Gordon bridge, and then made a detour to the Miller bridge, and got up on the road as soon as possible after crossing the Des Chutes river, and continued on it out to Grass Valley.

Q. 116. Why didn't you cross the Gordon bridge at that time?

A. I didn't think it was quite safe.

Q. 117. So you had to go round to the Miller bridge to get over the Des Chutes river, did you?

A. That is the way I went.

Q. 118. Do you know what has become of Mr. Kidder?

A. I do not.

Q. 119. Was this abstract you say you had of these lands in writing?

A. Yes, sir.

Q. 120. Where is it, do you know?

A. I guess probably in the hands of the company.

Q. 121. Have you seen it lately?

A. I have not; I saw it then, at that time.

Q. 122. When was that?

A. That was in 1874.

Q. 123. Where was it at that time?

A. In Portland.

Q. 124. Do you know how it came to be in San Francisco?

A. It was sent there.

Q. 125. Did these lawyers you say it was submitted to give any written opinion or certificate as to the title?

A. They satisfied the buyers, and the buyers were perfectly satisfied.

Q. 126. I asked you if they gave any written certificate of title?

A. I do not know sir; I presume they did though.

Q. 127. Do you know whether they did or not?

A. No.

Q. 128. You did not hear them pass on the title yourself?

A. I was not there to hear them pass upon it.

Q. 129. You do not know of your own knowledge whether they said it was good, bad or indifferent, do you?

A. I know from——

Q. 130. I mean from your own knowledge?

A. No; I was not there at the time.

Q. 131. Why was it you did not buy these lands and have The Dalles Military Road Company convey them to Mr. Martin instead of buying up the stock in the way you say you did?

A. The Dalles Military Road Company did convey them to Mr. Martin. We found the transaction to be more complete by taking the stock, in order to perfect the title; we took the stock with the lands.

Q. 132. Wasn't it because the stockholders refused to convey the land to Mr. Martin in the way you wanted it?

A. No, sir.

Q. 133. Who suggested the method you adopted as to taking the stock?

A. Their attorneys.

Q. 134. Whose attorneys?

A. The attorneys of the buyers, Mr. Winans & Belknap; they were the advisors, and they followed their direction.

Q. 135. Wasn't there some question about the kind of deed the company was to make, and was not that the reason you preferred to buy in the stock and get control of the company?

A. I do not know, sir; I never heard anything about it.

Q. 136. Did not the original managers of The Dalles Mili-

tary Road Company refuse to convey the lands to you by warranty deed?

A. I never heard anything of the kind; to the best of my knowledge and belief they were willing to convey it in any way; the choice was left to the purchasers as to the manner in which it should be done; I am quite confident of that.

Q. 137. Who are the officers of The Dalles Military Road Company now, if you know?

A. I know Mr. Thornbury is Secretary; I have forgotten who is President.

Q. 138. (Direct) Judge Kelly?

A. Well, I have forgotten; do not pay much attention to it; Colonel Kelly is still a stockholder in the company— a small stockholder.

Q. 139. Who are the officers of the Eastern Oregon Land Company?

A. D. V. B. Henarie is President and T. P. Beach is secretary.

Q. 140. Who are the Directors of that company?

A. I am one, with those I have enumerated, and Mrs. Eleanor Martin; five directors.

Q. 141. You stated that the land was transferred to this company in 1884?

A. Yes, sir.

Q. 142. Now, do you not know, Mr. Martin, at that time that the matter of these land grants had become the subject of investigation in Congress and before the Interior Department —the Secretary of the Interior?

A. I do not.

Q. 143. That it was asserted there that they had been obtained by fraud and misrepresentation as to the building of these roads?

A. I never heard anything about it; if there was, I never heard it.

Q. 144. Don't you know as a matter of fact, being an old resident of Oregon, that these land grants were the subject of a great deal of newspaper comment and political contention among the political leaders of Oregon at about the time they were made and alleged to have been accepted?

A. No, sir.

Q. 145. Did you never hear any talk of that kind?

A. No sir, positively none. There was no political agitation about the grant at that time whatever.

Q. 146. Wasn't it charged by the Democratic Party that it was a Republican scheme or measure; did you ever hear any talk of that kind?

A. No, sir, I never did.

Q. 147. And wasn't it claimed by the Republicans in answer to that that the principal stockholders in these various companies were Democrats, and were getting the principal part of the "pie" etc?

A. I never heard anything at all approximating such stuff, never.

Q. 148. What kind of business was you in as a merchant here, Mr. Martin?

A. Wholesale liquor business.

Q. 149. Who furnished the money that was paid for this stock?

A. Mr. James Phelan and Edward Martin.

Q. 150. How much did you pay or handle?

A. I think I paid it all.

Q. 151. Have you any written evidence to that effect, receipts or other written evidence to show the payment?

A. There is in my books.

Q. 152. I mean from these purchasers, the holders of the stock. Did you have any writing or receipt from them showing payments.

A. Nothing more than drafts. The drafts, of course, went to them that got them, and that is all the evidence there was and the moneys I paid here through Ladd & Tilton and The First National Bank. Some of them deposited their stock there until I got the money to pay for it. And when I paid for it I took the stock; transferred the stock to them in San Francisco, and that ended my business with the purchasing of it.

Q. 153. How much did your brother, Edward Martin, pay Phelan for his interest in the land?

A. He paid half of a little over $125,000; it was nearly $126,000, and he paid half of it and Mr. Phelan the other half.

Q. 154. Do you know that of your own knowledge?

A. I know as nearly as possible for a human being to know

it without being present. I have letters from him, and talked with him, and he told me all about it at the time; and, of course, there is no doubting it at all. Mr. Phelan was disgusted with the property after he passed over it, and my brother bought him out to get rid of him and to get rid of the annoyance incident to it; that is the fact of the matter; that is what he told me.

Q. 155. You say that you went over these lands, portions of them, and saw that they were mountainous and desert lands principally, and advised your brother to buy them at about twice what they were worth?

A. I did not say that; I did not go over the desert part of them; I went over the best part of them; that is, outside of The Dalles. The desert portion is further on.

Q. 156. You said, I believe, that you paid about twice what they were worth?

A. Yes, considered so after the purchase was made; after we fully realized what class of lands it was.

Q. 157. You bought these lands then without ever having examined the principal part of them?

A. I only saw about forty miles of them, and I have stated that they had the report of this expert engineer long before that, and I suppose they based their calculations upon his report; that and common hearsay. They had not seen them.

Q. 158. Did that engineer submit a written report?

A. Yes, sir.

Q. 159. Where is that report?

A. I do not know.

Q. 160. How many shares of stock are there in this Eastern Oregon Land Company?

A. Ten thousand.

Q. 161. How much a share?

A. One hundred dollars a share, par value.

Q. 162. That would make your 300 shares of the par value of how much?

A. Thirty thousand dollars; I would like to sell it to somebody for that.

Q. 163. You know Mr. Thornbury personally, who was on the stand here the other day, do you not?

A Yes.

Q. 164. Has he not a contract with the Eastern Oregon Land Company for making sale of these lands?

A. No, sir: I think not.

Q. 165. Didn't he have?

A. He did have.

Q. 166. When did that terminate?

A. I think it terminated by limitation several years ago.

Q. 167. He is still secretary of The Dalles Military Road Company?

A. Yes, sir.

Q. 168. You spoke of Senator Kelly. Do you know when he was in the Senate of the United States; when his term expired?

A. I have forgotten all about that.

Q. 169. It was after 1876, was it not?

A. I do not recollect.

Q. 170. He was in the Senate in 1874, was he not?

A. I don't recollect; I did not pay much attention to it; yes, I guess he was there in 1874.

Q. 171. That is, when this statute that these purchasers relied on so strongly was passed, was it not?

A. I believe so.

RE-DIRECT EXAMINATION OF MR. MARTIN.

Q. 172. Had The Dalles Military Road Company at the time you bought its stock any other property than this land grant?

A. Not to my knowledge.

Q. 173. Did you pay out any other money for the property, or in acquiring its title, other than that paid for the stock of the company?

A. No.

Q. 174. You said you had never heard the opinion of Winans & Belknap on this abstract of title at the time you purchased?

A. No; Not at that time.

Q. 175. Had you heard the opinion of any other attorneys as to the title expressed at that time?

Objected to as incompetent and immaterial.

A. Yes, sir.

Q. 176. What attorneys were they?

A. Judge William Strong, here.

Q. 177. Any others?

A. I heard Judge Hummason express his opinion about it; that is all I remember now.

Q. 178. Do you know when Judge Kelly acquired his present stock in The Dalles Military Road Company, and for what purpose he acquired it?

A. It was for the purpose of qualifying as Director.

Q. 179. How long ago was that?

A. Well, at the time of his election as Director.

Q. 180. How long ago was that?

A. Well, at the time of his election as such Director.

Q. 181. Do you remember when that was?

A. Several years ago.

Q. 182. Do you know the value of his present stock in it?

A. Merely nominal; perhaps $100 or $50.

Q. 183. Where is Judge William Strong now?

A. He is dead.

Q. 184. How does the character of the land examined by you of that forty miles of road you passed over compare with the land on the balance of the road?

A. Well, the land at this end of the road is the best of it; The land at the extreme end is entirely worthless; there is no value put on it by the present company; they regard it as worthless.

Q. 185. You mean the eastern end of the road?

A. Yes; with the exception of a few spots along the line of the road; say a little in Antelope valley, and a little along the John Day, and some timber in the mountains; the balance of it is practically worthless; that is the general opinion; have never been able to sell any of it, and the highest price I have ever known to be offered for any of it in a body is ten cents an acre.

Q. 186. You said the par value of the stock of the Eastern Oregon Land Company is $100 a share. What is the actual value of that stock?

A. I could not tell you, as it has no market value; could not sell it for anything, unless to somebody that had some particular use for it; well, I don't know what they could do with it.

RE-CROSS EXAMINATION.

Q. 187. What do you meon by the extreme end of the road when you say the lands there are worthless; how much of it?

A. I mean that part of the country adjacent to Snake River.

Q. 188. How many acres would that probably include in this grant?

A. Probably that portion adjacent to Snake River, which perhaps comprises one-fourth of it.

Q. 189. You say the company, the present claimant of that land, considers that portion of the grant worthless?

A. Yes, sir; they sent a man over it, and he experted it, and pronounced it worthless; put it down as of no value.

Q. 190. I suppose you would not object seriously then to that portion of the grant being forfeited, would you?

A. No, I think not; I think they would gladly give it to the Government.

Excused.

(Signed), P. J. MARTIN.

Attest: GEO. H. DURHAM, Examiner.

Whereupon further proceedings herein were now adjourned without date.

Before the testimony of this witness was transcribed, he appeared before the Examiner and asked to make the following correction and explanation:

On reflection, and before reading over my testimony herein, I wish to state to the Examiner that I desire to explain my answer to interrogatory No. ——, which I think was left somewhat ambiguous, as follows: Where I stated that the highest price offered for any of the lands was ten cents per acre in large bodies I referred to pasture lands in the John Day Valley, and did not refer to the bad lands at the eastern end of the road near Snake River, which are entirely worthless; nor did I mean that a part of the lands at the western end near The Dalles were not worth more than ten cents per acre, but that is all we have been offered for large bodies of the lands in the John Day Valley.

(Signed), P. J. MARTIN.

Portland, Oregon,
Saturday, August 22d, 1891, 2:30 P. M.

Parties met by consent, the defendants appearing by A. L. Frazer, Esq., their solicitor, and the complainants appearing by A. H. Tanner, Esq., its solicitor, whereupon the following proceedings were had, to wit:

.....

Examiner.

MRS. ELEANOR MARTIN was called and sworn in behalf of the defendants, and testified as follows:

Questions by Mr. Frazer:

DIRECT EXAMINATION.

My name is Eleanor Martin; I am 59 years old, more or less; I do not know exactly, and live in San Francisco, California.

Q. 1. You are the widow of Edward Martin, deceased, and one of the defendants in this suit, are you not?

A. Yes, sir.

Q. 2. When did your husband, Edward Martin, die?

A. He died May 12th, 1880.

Q. 3. Do you remember the time when he purchased the land grant of The Dalles Military Road Company, or a part of it?

A. Well, I will have to refer you ——

Q. 4. I do not care about the date, only the circumstance.

A. Oh, yes; I remember it very well.

Q. 5. State whether or not Mr. Martin talked with you about the matter during the negotiation for the purchase?

Counsel for claimant objects on the ground that it is incompetent and immaterial.

A. If you wish me to say anything about it, of course he did.

Q. 6. State whether you were acquainted with the correspondence that passed between your husband and P. J. Martin, his agent, during the time of these negotiations?

A. Yes, sir; he used to show me the correspondence, just as the case might be, or he would tell me of it if I would be near him; we talked about it.

Q. 7. State whether or not, to your knowledge, Mr. Martin had any notice of any fraud in the construction of the road

of The Dalles Military Road Company, or in procuring the Governor's certificate, when such road was constructed?

A. He never had any such notice, and he never had any doubt then that there was anything at all except that it was a perfect title. It had the signature of the Governor of Oregon. He never thought of such a thing.

Q. 8. Did he ever have any notice of any fraud or any information that would lead him to suspect there was any fraud in procuring these lands to be listed by the Secretary of the Interior, or part of them to be patented by the United States, to your knowledge?

A. He never did; never. He had full faith in the validity of the title, from what he was told at the time.

Q. 9. What was Mr. Martin's characteristics as a business man; that is, was he disposed to speculate in doubtful property, or was he one of the prudent and practical kind?

Counsel for claimant objects on the ground that it is immaterial and incompetent.

A. Mr Martin would not invest in anything in which he thought there was a doubt. Everybody that knew him, had the utmost confidence in him, so much so, these gentlemen associated with him wished him to do everything for them, he had everybody's confidence, and he never was disposed to invest in anything that was not legitimate and right, and he would not permit anyone around him to do so.

Q. 10. Did he ever speculate in doubtful property?

A. Not any, he had the confidence of everybody that knew him in any transaction, whole societies would employ him to transact business for them, because they had so much confidence in him, as you know, Mr. Beach, several parties had him transact business for them, and he was Treasurer and Secretary, of the Hibernia Bank, from which he received the highest encomiums at the time of his death for its management and the prosperous condition in which it was found.

Q. 11. State, if you know, whether or not Mr. Martin before he purchased the land had an abstract of title, and had such abstract of title examined by his attorneys?

A. Of that I do not remember myself, I presume he had. I did not have occasion to know that.

Q. 12. Who are the present owners of this land grant?

A. The present owners are the Eastern Oregon Land Company.

Q. 13. For what was that company organized?

A. For what was it organized

Q. 14. For what particular purpose, I mean was it organized for anything else other than to acquire this ground, possession of this soil?

A. That was all, all of the owners of it lived in San Francisso, we could not attend to the business here, because we were all down there, so far as I know.

Q. 15. Who were the stockholders and incorporators of the Eastern Oregon Land Company at the time it was organized?

A. The present owners.

Q. 16. At that time?

A. As near as I can remember—of course it was not very convenient for us to come up here.

Q. 17. Who were the stockholders at that time?

A. The stockholders were the heirs of Edward Martin, myself, his children, and the minor children and D. V. B. Henarie, I believe, that is as well as I can remember.

Q. 18. Did you at the time of the organization of the Eastern Oregon Land Company have any knowledge of any notice of any fraud in the construction of that road or the getting of the Governor's certificate?

A. Never. I never had any notice of fraud or any kind in procuring anything that belonged to the company, that is all I know.

Q. 19. Did your husband, Edward Martin, purchase the whole of this property at first, or were there others associated with him?

A. There were others associated with him; there was James Phelan, Henarie and myself; James Phelan purchased half, Henarie a quarter, and my husband the other quarter.

Q. 20. What become of Phelan's interest?

A. Finally my husband bought his interest after some time, I do not know what time.

Q. 21. Do you know what amount your husband paid to Phelan for his half interest?

A. I could not say exactly. That I do not know, I presume it was a sum agreed between them, a considerable sum.

Q. 22. Do you know of the payment of any part of that sum?

A. I certainly do; since his death we had to pay the note that he gave in addition to the former purchase.

Q. 23. How large was the amount of that note?

A. I do not know exactly, probably it is of record; it is in the Probate Court of San Francisco.

Q. 24. Do you know what sum your husband, Mr. Phelan and Henarie paid for this property in the first instance?

A. I have understood that they paid $125,000 for it, more or less, I can say no less; it might be more.

CROSS-EXAMINATION.

Questions by Mr. Tanner.

Q. 25. You and your husband and family lived in San Francisco at the time of this purchase?

A. Yes, sir.

Q. 26. How long ago has it been since he bought this land?

A. I will have to ask you, Mr. Beach, it is a matter of record; I cannot state; I do not remember exactly.

Q. 27. You do not know of your own knowledge whether he paid $125,000, more or less?

A. I certainly do; I have gone over the books.

Q. 28. You do not know of your own knowledge, do you, whether your husband paid $125,000 or not at the time this purchase was made?

A. I did not go with my husband; I know he paid it, because he told me so.

Q. 29. You did not see him pay it?

A. I did not see him; I know he did from the checks and the books of the company, and everything.

Q. 30. Did your husband make any investigation to find out whether there had been any fraud committed or not?

A. I presume he did.

Q. 31. Do you know?

A. I know he did.

Q. 32. What did he do to find out whether there was any fraud or not?

A. I cannot tell you what he did; he never knew there was any fraud.

Q. 33. Who made this purchase for your husband?

A. I think his brother, J. P. Martin, made the purchase; I think so.

Q. 34. Did your husband buy the stock of The Dalles Military Road Company first before he got the land?

A. He bought the stock first.

Q. 35. Did he send the money up to P. J. Martin?

A. Yes, sir; through the bank and otherwise.

Q. 36. Did he send it all at the same time?

A. No; just as they needed it.

Q. 37. To pay for that stock?

A. Yes, sir.

Q. 38. Was it sent in small amounts?

A. I could not say; my husband did his own business; I did not have to know what he was doing in the way of sending money.

Q. 39. The fact is, Mrs. Martin, as you have just remarked, that your husband transacted his own business, and you did not know much about it, did you?

A. Except what he told me, I did not; after his death I had to know plenty about it; I did not know it just then; I did not think it was necessary; after his death I knew all about it.

REDIRECT EXAMINATION.

Q. 40. Did you administer on Mr. Martin's estate?

A. Yes, sir; both here and in California, as guardian for the children here.

(Signed), ELEANOR MARTIN.

Excused.

Attest: GEO. H. DURHAM, Examiner.

---

THOMAS P. BEACH, a witness produced on behalf of the defendants, is sworn, and testifies as follows:

DIRECT EXAMINATION.

Questions by Mr. Frazer:

Q. 1. State your name, age, place of residence and occupation?

A. My name is T. P. Beach, age 52, and I live in San Fran-

cisco, California. I am secretary of the Eastern Oregon Land Company.

Q. 2. How long have you been secretary of that company?

A. Since the organization; I think it was incorporated in 1884; the papers will show.

Q. 3. Did you have anything to do with the management of the land grant of The Dalles Military Road Company, which afterwards became th property of the Eastern Oregon Land Company before the organization of the Eastern Oregon Land Company?

A. I did.

Q. 4. How long before, and what was the nature of your duties there?

A. They commenced soon after the death of Mr. Martin for clerical services for Mrs. Martin; I attended to The Dalles Military Road Company; I collected from the different owners such pro rata as had to be paid, answered correspondence connected with it, collected from the different owners such pro rata as had to be paid, for the expenses, taxes, improvements to the road, got their various signatures to deeds to complete contracts that had been made during Mr. Martin's lifetime, and other matters necessary for carrying it on.

Q. 5. Did you during these times have any knowledge or information of any fraud in connection with the building of that road, or procuring the Governor's certificate to the land grant in any way?

Counsel for claimant objects on the ground that it is immaterial and incompetent.

A. I cannot say positively at what time after Mr. Martin's death, some time after I became familiar with the road, a year or more; I heard of this agitation commenced in Congress, introduction of bills through different persons from Oregon, agitated the question of fraud; that is the first and all I knew of that. I never heard anything until that came up; until the agitation in Congress. I had been some time transacting Mr. Martin's business before I learned of it; from that time I was acquainted with the Congressional proceedings.

Q. 6. Do you know whether or not the Eastern Oregon Land Company and its predecessors, Mr Martin's heirs and Mr. Henarie, have paid the taxes on this land?

A. I know positively they have since my connection with the con cern.

Q. 7. What amounts have they paid, if you remember?

Counsel for claimant objects on the ground that it is immaterial and irrelevant.

A. This year just past up to the first of March or April, we paid about $5,000.00 the year prior to that we paid about $4,000.00 or $4,800.00 —two or three hundred dollars less than this last year: it increased with the years, this last year was the most.

Q. 8. State, if you know, what other expenses the company have been to in connection with this land grant?

Counsel for claimant objects on the ground that it is immaterial, and incompetent and irrelevant.

A. About the time the company was organized we paid for improvements and building bridges on the road. I think I sent up $1,000.00 or $1,500.00, about the time the company was incorporated to Mr. Thornbury, who was up at The Dalles. I do not know the details of all the expenses.

Q. 9. Were you acquainted with Edward Martin in his lifetime?

A. Yes, sir.

Q. 10. What was his character as a business man as to being a speculator or otherwise?

Counsel for claimant objects on the ground that it is immaterial, incompetent and irrelevant.

A. Of a very high character; he was noted as a man of unusual character, and a very conservative man.

Q. 11. State, if you know, whether he was accustomed to invest in property of which there was a cloud on the title or any doubt to the title?

Counsel for claimant objects on the ground that it is immaterial and irrelevant.

A. I never heard of him doing any thing of the kind; I was not familiar with his operations except city property in San Francisco.

CROSS-EXAMINATION.

Questions by Mr. A. H. Tanner:

Q. 12. Where did Martin die; if you know?

A. I know from the records.

Q. 13. When was it?

A. The 12th day of May, 1880.

Q. 14. You say the Eastern Oregon Land Company was organized when?

A. I think it was in 1884; I think it was in September, 1884. The papers show.

Q. 15. This Eastern Oregon Land Company was not organized until after Mr. Martin's death?

A. No, sir; some four years after.

Q. 16. Was you in Mr. Martin's employ at the time of his death or prior to that time?

A. No, sir.

Q. 17. Your first connection with this land matter has been since his death, has it not?

A. Yes, sir.

Q. 18. Were you prior to Mr. Martin's death intimate with his business transactions so as to know whether he speculated extensively or not?

A. I was not intimate with his business transactions; I knew the character of the man before.

Q. 19. What was his business?

A. He was a banker and engaged in the wholesale liquor business.

Q. 20. In San Francisco?

A. Yes, sir; he was the manager of the Hibernian Savings and Loan Society from its inception until the time of his death; secretary and manager; he also negotiated the First National Bank, and was a director and owner in it.

Q. 21. You have only been paying taxes on a portion of these lands that have been patented to the company?

A. That is all I know of. I will say here that Mr. Thornbury has been at The Dalles since my connection with it, and he has been attending, with the assessors, to the portion in the county. They may have paid for portions not patented; I really do not know. I know they paid in several counties.

Q. 22. You do not understand you are paying on all these lands?

A. My understanding is that they are paying on patented lands.

Q. 23. You say Mr. Thornbury is agent of the Eastern Oregon Land Company at The Dalles?

A. Yes, sir.

Q. 24. How long has he been acting in that capacity?

A. Soon after our incorporation.

Q. 25. Was he representing Mr. Martin in any way before the incorporation of the Eastern Oregon Land Company?

A. He was secretary of The Dalles Military Road Company; he retained that position, which he holds to-day.

Q. 26. What is the capital stock of this Eastern Oregon Land Company?

A. One million dollars. Do you mean the value of the number of shares—one million; 10,000 shares.

REDIRECT EXAMINATION.

Q. 27. Did any other parties than those having interests in the land grant become subscribers to the original stock of the Eastern Oregon Land Company?

A. Yes, sir; there were some others.

Q. 28. When the company was first organized?

A. Yes, sir.

Q. 29. When the Eastern Oregon Land Company was first incorporated?

A. Yes, sir.

Q. 30. Has the Easteru Oregon Land Company any other property than this land grant?

A. Nothing outside of its furniture in San Francisco.

RE-CROSS-EXAMINATION.

Q. Who owns the bulk of this stock now: I mean the stock of the Eastern Oregon Land Company?

A. The largest single owner is Mrs. E. Martin, her three minor children and Mr. Henarie; I cannot give you a list of all of them; Mr. Martin's heirs own the bulk of it; Mrs. Martin's heirs own a little over the majority of the stock.

RE-DIRECT EXAMINATION.

Q. 32. One thing I forgot—do you know how much Edward Martin paid Mr. Phelan for his half interest in the land?

A. I do not know the exact amount; I know a certain

amount that he did pay, whether that was all or not I do not know; I know he gave a note for $50,000, and that that note has been paid since his death. I know my business transaction with Mr. Phelan and Mr. Martin made me know that note was given for $50,000 in payment for buying that interest from Mr. Phelan; whether that covered it all or not I do not know.

RE-CROSS EXAMINATION.

Q. 33. What was the date of the note, if you remember?

A. The note was dated before the 12th of May, 1880, of course before Mr. Martin's death, and has been paid may be four years after his death; it was four years after Mr. Martin's death before Mrs. Martin paid it up.

Q. 34. You cannot recollect the date of the note?

A. No, sir.

Q. 35. The note has all been paid?

A. Yes, sir; it has all been paid, with the interest; the interest was over ten thousand dollars; that I remember.

Excused.

(Signed) T. P. BEACH.

Attest: GEO. H. DUNHAM, Examiner.

Adojurned without date.

---

September 5, 1891, 1 o'clock P. M.

Come now the parties at my office at this time, by consent, whereupon the following proceedings were had and done, to wit:

DONALD MACLEAY, a witness produced, sworn and examined on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

Interrogatories by Mr. Frazer:

Q. 1. State your name, age, residence and occupation?

A. Donald Macleay; age, 58; occupation, merchant; residence, Portland, Oregon.

Q. 2. How long have you been engaged in business in Portland?

A. Twenty-five years.

Q. 3. Were you a stockholder in The Dalles Military Road Company prior to 1875?

A. I was a stockholder prior to that, if my memory serves me well; I do not remember the dates.

Q. 4. I mean prior to the time the stock and road were sold to Edward Martin?

A. Yes; prior to that I was, and probably prior to 1875.

Q. 5. What amount of stock, or number of shares, did you own in the company?

A. I think it was 250 shares.

Q. 6. To whom did you sell this stock?

A. If I remember right, it was to Mr. P. J. Martin; I would not be positive, but I think it was; It was a long time ago and I forget these things.

Q. 7. What was the consideration received by you for this stock?

A. I believe it was $5,000, but I would notremember that were it not that my memory was refreshed the other day.

Q. 8. Was this consideration, whatever it was, paid to you in money or its equivalent?

A. Yes, sir.

Q. 9. Did you sell this stock in good faith and for what you considered its value at that time?

A. I did.

Q. 10. Did you at the time you sold this stock or prior thereto have any knowledge or information that would lead you to suspicion that there had been any fraud practiced by The Dalles Military Road Company, either in constructing the road or in obtaining the Governor's certificate that the road had been constructed and completed, or in obtaining patents for any part of the land, or in having any part of the land listed by the Secretary of the Interior, or in any other matter connected with that road or that company?

Objected to as incompetent and immaterial and irrelevant.

A. I remember nothing whatever connected with it further than that it was a bona fide transaction. Otherwise I would not have given my money for it in the start.

Q. 11. Was there to your knowledge any claim to the ownership of the land at that time, or was the United States making any claim to the land at that time?

A. I do not remember of any.

CROSS-EXAMINATION.

Questions by Mr. Tanner:

Q. 12. How was this $6,000 paid to you for the stock?

A. Well, I do not remember whether it was cash or the equivalent of cash. It was money or the equivalent of money, notes or mortgage; I forget exactly which.

Q. 13. By whom was it paid to you?

A. I do not remember that, but I think it was Mr. Martin, or his attorneys or agents.

Q. 14. Where was it paid?

A. I do not remember that; probably at my office.

Q. 15. How long had you held this stock before you sold to Martin?

A. I do not remember that.

Q. 16. When was it you sold to Martin?

A. I do not remember that; I believe it was in 1875 from records I have seen, but I do not know that.

Q. 17. Of whom did you buy this stock?

A. That I do not remember.

Q. 18. Was you one of the origional promotors of the company?

A. No, sir. If my memory serves me well, I bought my stock of Robbins, since dead, but I am not positive of that.

Q. 19. Had you ever any time made any inquiry to ascertain whether there had been any fraud perpetrated in the construction of this road, or in securing the certificates of the Governors as to its completion?

A. I do not remember; it is not at all likely I would have purchased stock if I had thought there was any fraud connected with it.

Q. 20. Did you make any effort to ascertain that fact?

A. I do not remember of it, but business men generally do, and I am a business man.

Q. 21. Well, are you prepared to say whether you did or not make any investigation?

A. No, I am not prepared to say.

Q. 22. How much did you pay for the stock, do you remember that?

A. I do not remember positively; I do not remember at all indeed, how much I paid for it.

Q. 23. Can you state approximately?

A. No, I do not remember; our books burned, or I could have told you all about it; but during the fire our books burned in connection with it.

Excused.

(Signed), D. MACLEAY.

Attest: GEO. H. DURHAM, Examiner.

---

HENRY HEWITT, a witness produced, sworn and examined on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Frazer:

Q. 1. State your name, age, residence and occupation?

A. Henry Hewitt, age 44, residence Portland, Oregon, commission merchant and insurance agent.

Q. 2. How long have you been engaged in this business in Portland?

A. About twenty-one years.

Q. 3. Were you prior to the time the stockholders in The Dalles Military Road Company and the Land Company sold the land grant of The Dalles Military Road Company to Martin and others a stockholder in that company?

A. Yes, sir.

Q. 4. What amount of stock did you hold?

A. I remember how much that stock cost.

Q. 5. What was the amount?

A. Three thousand dollars.

Q. 6. That it cost you?

A. Yes; I do not remember just how many shares.

Q. 7. Did you sell this stock?

A. Yes, sir.

Q. 8. To whom?

A. To Mr. Martin.

Q. 9. When was it, if you remember?

A. Somewhere about 1872.

Q. 10. Was it not as late as 1875?

A. Well, I do not know; say from 1871 to 1875, somewhere in between, but I do not remember the time. I thought

it was about 1872. Yes, on reflection, it would be nearer 1875 than 1872.

Q. 11. What was the amount you received from this stock?

A. Twenty-two hundred dollars.

Q. 12. Did you sell this stock in good faith and as a business proposition?

A. Yes.

Q. 13. Did you consider that you were receiving something near the value of the stock when you sold it?

A. No.

Q. 14. For what reason did you sell?

A. I sold because everybody else was selling out, and I was afraid I would be frozen out.

Q. 15. Did you at the time you sold, or prior thereto, have any knowledge of any fraud connected with the construction of the road or the obtaining of the Governor's certificate as to its completion, or in any other matter in connection with that road or The Dalles Military Road Company?

Objected to as immaterial, incompetent and irrelevant.

A. I never had the slightest intimation, directly or indirectly, in any way whatsoever, of fraud in connection with it; never heard it mentioned in any way.

Q. 16. Did Mr. Martin, to your knowledge, have any reason at that time to suspicion that there was fraud connected with the land grant in any way?

Same objections.

A. No, sir.

CROSS-EXAMINATION.

Questions by Mr. Tanner:

Q. 17. You do not know personally what knowledge he may have had on that subject?

A. No; I do not know personally what knowledge he may have had.

Q. 18. You simply sold your shares, whatever they were, of stock in the company, didn't you, when you sold out to Martin?

A. Yes.

Q. 19. You sold to P. J. Martin, did you?

A. I sold through Edwin Russell, Manager of the Bank of British Columbia; he said he was going to sell to Martin; I did

not know Martin's initials, or which one it was; but it was the liquor dealer Martin.

Q. 20. You do not know who paid for this stock the $2,200?

A. No; well, Mr. Russell told me Martin paid it; that is all I could tell; Mr. Russell paid me.

Q. 21. All you know about it is what Russell told you?

A. Yes.

Q. 22. This stock was sold by you long prior to any transfer of the land grant, wasn't it, or do you know about that?

A. No; I do not know anything about that; what do you mean by transfer?

Q. 23. The transfer of the land grant by the company to Edward Martin?

A. No; this was when the company was selling the whole business to Martin; I was one of the last to sell.

Q. 24. You mean the stock, don't you?

A. The stock; yes.

Q. 25. You understood then, at the time you sold, that Martin was buying up all the stock?

A. The whole grant.

Q. 26. And that is why you sold out so cheap?

A. Yes.

RE-DIRECT EXAMINATION.

Q. 27. Russell simply acted as your agent in the matter of making the sale?

A. Yes.

Excused.

(Signed), HENRY HEWITT.

Attest: GEO. H. DURHAM, Examiner.

---

WILLIAM GRANT, a witness produced, sworn and examined on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Frazer:

Q. 1. State your name, age, residence and occupation?

A. William Grant; age, 48 years; I reside in Grant, Sherman County, Oregon; merchant.

Q. 2. Were you a stockholder in The Dalles Military Road Company prior to the time of the selling of the grant in 1875?

A. Yes, sir.

Q. 3. What office, if any, did you hold in that company?

A. I was Secretary of the company.

Q. 4. Were you Secretary of the company at the time the negotiations for the sale and at the time the sale was made, to Edward Martin?

A. Yes, sir.

Q. 5. What amount of stock did you own in the company then?

A. 250 shares; also owned some scrip of the company.

Q. 6. In what manner was this sale negotiated?

A. It was negotiated through Ex-Governor Curry, who sold the stock of the company to Edward Martin and James Phelan of San Francisco.

Q. 7. Do you know who acted as the agent of Edward Martin and James Phelan, in this State in this matter?

A. I do.

Q. 8. Who was that?

A. P. J. Martin.

Q. 9. What was Governor Curry's connection with the matter?

A. Simply to negotiate the sale.

Q. 10. Where was Curry when he negotiated this sale?

A. He was a resident of Portland at that time.

Q. 11. Where was this negotiation carried on?

A. The negotiation was started in Portland and was consummated at The Dalles.

Q. 12. Did the stockholders as a body resolve to sell to Martin before the stock was transferred to him?

A. Yes, sir.

Q. 13. Why was the sale made by transfer of the stock instead of by deed direct?

Objected to as immaterial.

A. The attorney of the company preferred selling it in that way to giving a deed direct; and the attorney of the purchasers also consented to do it that way. The reason assigned was that the new purchasers should step into the shoes of the

old company. For that reason the stock was sold instead of making the deed.

Q. 14. Were you present when the bargain for the sale was made with Martin's agent?

A. Yes.

Q. 15. Where was that?

A. It was consummated at The Dalles.

Q. 16. About what time?

A. It was in December. I have a memorandum here I took from an old record, and I can come pretty close to it. It was about the 9th or 10th of January, 1875.

Q. 17. Who were the principal stockholders in the company at that time?

A. Dr. Mitchell, Hummason, Col. Kelly, Savage, Burrell, Walker, Seller, Russell, Hewitt, Macleay and myself.

Q. 18. What did you receive for your 250 shares?

A. $6,250.

Q. 19. Was this paid to you in cash?

A. Yes; check on the Bank of San Francisco.

Q. 20. Were you present when the money was paid to any of the other stockholders?

A. I have been present when it was paid to the majority of them.

Q. 21. Do you know what amount was paid to Dr. Mitchell or his widow for his share?

A. About $14,000.

Q. 22. Do you know what amount was paid to Hummason?

A. $18,000.

Q. 23. What amount, if you know, was paid to O. S. Savage?

A. $12,000.

Q. 24. And to Judge Kelly?

A. To Judge Kelly $12,000, and the other shares in proportion; the sale to Macleay might not have been consummated on that day; it might have been afterwards.

Q. 25. Did you see the amount you have named paid to Mrs. Mitchell;

A. Yes, sir.

Q. 26. Did you see the amount you have named paid to Judge Savage?

A. Yes.

Q. 27. Do you know whether or not that is the exact amount paid to Judge Kelly?

A. Well, I could not be positive, but I think the check was for that amount, neither did I see him paid the amount, because he was in Washington; but Savage was acting as agent.

Q. 28. At the time of this sale or prior thereto did you have any knowledge of any fraud having been perpetrated by The Dalles Military Road Company in the construction of their road, or in obtaining the Governor's certificate to its construction and completion, or in getting the Secretary of the Interior to list any part of the lands, or obtaining patents for any part of the lands?

Objected to as immaterial, incompetent and irrelevant.

A. No, sir.

Q. 29. Did you have any reason to suspicion that fraud had been used in any of these matters?

Same objections.

A. No, sir.

Q. 30. Was there at that time any other party or parties claiming title to this land besides The Dalles Military Road Company?

Same objections.

A. No, sir, unless where there was an occasional settler that claimed a prior right to the company.

Q. 31. That was only in cases where there was a question as to priority?

A. Priority of claim.

Q. 32. But as to the body of the grant, did the United States at that time claim title to it, or dispute the title of The Dalles Military Road Company?

Same objections.

A. No, sir; nor no one else.

Q. 33. Did Edward Martin at that time, or P. J. Martin or ex-Governor Curry, as agents, to your knowledge have any knowledge of any fraud having been used in obtaining this grant, or in any matter connected with it?

Same objections.

A. No, sir.

Q. 34. State if you know whether they made or had made for them an examination of the title before purchasing?

A. They did.

Q. 33. What did they do or have done?

A. They had the records examined.

Q. 36. Did they make an abstract of title?

A. My understanding was that they sent a man from San Francisco.

Q. 37. Who was that man?

A. Tim O'Lynch, to inquire into the title.

Q. 38. Did you see him examine the records and papers of the company?

A. I did.

Q. 39. Did you see the abstract after it was made?

A. Yes.

Q. 40. Of what did that abstract consist as nearly as you remember?

A. As nearly as I can remember it was the act which granted this to the State in trust for The Dalles Military Road Company, and then the act of the legislature that enabled the State to grant that to The Military Road Company after the land was approved and selected: and it required the certificate of the surveyor who surveyed the road and transfers that had been made.

Q. 41. Was the Governor's certificate a part of this abstract?

A. Yes, sir.

Q. 42. Do you know whether or not this abstract was submitted to the attorneys of Edward Martin and James Phelan in San Francisco?

A. Well, I suppose so.

Q. 43. Are you familiar with the land embraced within this grant.

A. Yes.

Q. 44. Describe it?

A. It embraced every alternate section for three miles on each side of the road, commencing at the Courthouse in Dalles City, running through Wasco County, Grant County and Baker, to old Fort Boise.

Q. 45. I mean describe it as to the character of the land, the kind of land it was?

A. The first ten miles of the grant was grazing land in its original shape; the next thirty miles of it is through a piece of good agricultural country, capable of raising cereals; the next hundred miles was through a rolling, rough, hilly country, chiefly valuable for stock-raising, and nothing else: only a few creek bottoms which would produce; the next thirty miles was through the John Day Valley, which is good land, but two-thirds of it was taken up by settlers prior to the grant: the balance of the route is through a sagebrush country, and chiefly valuable for grazing purposes; some timber on it.

Q. 46. In the John Day Valley, where you say two-thirds of the land was taken up by settlers, what kind of land was then left for the company?

A. What did they get in lieu thereof?

Q. 47. Yes?

A. Well, they were allowed seven miles on each side of the three-mile limits to select lieus from, contiguous to the lands that they lost.

Q. 48. What was the character of the land generally they got in lieu of the agricultural land in the John Day Valley?

A. Well in selecting they selected the best they could. They selected the best.

Q. 49. The best that was not taken up by settlers?

A. Yes.

Q. 50. What is the value of the land from the John Day Valley on to the Snake—the comparative value of it?

A. One-half of it I would not pay taxes on if I had a deed to it; and the other half, take the average, would be worth about Government price.

Q. 51. You mean in the whole grant through?

A. Oh, no; speaking of that particular part from the John Day Valley out.

Q. 52. (Cross.) Do you mean $1.25 an acre?

A. Yes.

Q. 53. Taking the whole grant through, what proportion of it is arable land and subject to cultivation?

A. Oh, about one-eighth.

Q. 54. What was the price paid by Martin and his associates for this property?

A. About $120,000.

Q. 55. Was that a fair value for the land at that time?

A. It was more than any one else would have given for it, and I consider that it was well sold.

Q. 56. Did The Dalles Military Road Company own any other property at the time of the sale of the stock to Martin?

A. No, sir.

Q. 57. I mean any other property excepting this land grant?

A. No, sir; he bought their grant entirely, and any debts there was against it.

Q. 58. When did you cease to be Secretary of the company?

A. Shortly after the transfer to Edward Martin and his associates.

CROSS-EXAMINATION.

Questions by Mr. Tanner:

Q. 59. As a matter of fact the stock was sold to Edward Martin instead of this land grant, was it not?

A. This transfer was made of the stock which carried with it the land grant.

Q. 60. That is, you mean, when they bought up the stock and controlled the company, they controlled the grant?

A. They controlled the grant: all the company owned, and in expectancy.

Q. 61. But the money was actually paid out to you stockholders for your stock, was it not?

A. For the stock, and the stock carried with it the land.

Q. 62. But you simply transferred your stock to this purchaser and got your money, didn't you?

A. That is all; and transferred all our right, title and interest in the books and in the records to the purchaser.

Q. 63. That was done you say under the advice of the attorney of the company?

A. Yes.

Q. 64. Who was the attorney of the company at that time?

A. Judge O. Hummason.

Q. 65. He is the same man you mentioned as having received $18,000 for his stock in the company?

A. Yes, sir.

Q. 66. You say the reason assigned for advising that course was that these new purchasers should step into the shoes of the old company in the premises.

A. Yes.

Q. 67. Wasn't the company advised to take that course in order to avoid the responsibility of making deeds to the purchasers of their grant at that time?

A. No, sir; they were advised chiefly on account of some of the land being unsurveyed at that time, and that a deed given to unsurveyed land I presume would not be of much value.

Q. 68. It was for the reason then that it was considered that deeds could not be made to this grant at that time?

A. To that portion that was unsurveyed.

Q. 69. How much of the grant was surveyed at that time?

A. Well, I could not tell; but I suppose there would be fully a third.

Q. 70. You say the records were examined by Timothy O'Lynch?

A. Yes.

Q. 71. Who was he, do you know?

A. He was a land expert from San Francisco, sent up for that purpose.

Q. 72. Was he a lawyer or not?

A. I do not know that he was a lawyer, but he made that his business, examining titles and such matters.

Q. 73. Do you know what became of the abstract that he made?

A. I do not.

Q. 74. You saw it, did you?

A. Yes.

Q. 74½. When was that?

A. The date I could not tell you.

Q. 75. You do not know whether it was ever submitted to any of the attorneys in San Francisco or not, do you, of your own knowledge?

A. I think it was.

Q. 76. Of your own knowledge do you know whether it was or not?

A. No, I have not seen it; but I presume it was.

Q. 77. What was the average value of this land grant per acre for the first ten miles you have mentioned, from The Dalles court house out?

A. Well, at that time it would not be worth over a dollar an acre.

Q. 78. From The Dalles out?

A. No.

Q. 79. What kind of land was that?

A. Well, it is all rolling land.

Q. 80. Good for grazing purposes?

A. Yes.

Q. 81. What is the value of the land on the average per acre of the land grant of the next thirty miles through which this road runs?

A. Do you mean the value of it then?

Q. 82. Yes, at that time, per acre.

A. Oh, I suppose it would be worth a dollar and a half an acre.

Q. 83. That passed through a good agricultural country I understood you to say?

A. Yes, fair; it has turned out to be.

Q. 84. You consider good agricultural land worth $1.50 an acre do you?

A. Well, I did then, because we did not believe it would produce anything.

Q. 85. What is your judgement; would good agricultural land be worth $1.50 an acre or more?

A. At that time.

Q. 86. Now or at any time. You say it was good agricultural land at that time?

A. Well, you could not buy that land now for less than $4 an acre from the company, or among the settlers; but it has been tested and proved that it will produce a crop occasionally, by a certain class of farming.

Q. 87. What would be the average value of that part of it in the John Day Valley you spoke of?

A. It would be worth $5 an acre; it is on the river; the river bottoms.

Q. 88. At that time you mean?

A. Yes: but two-thirds of that had been taken up by set-

tlers prior to the grant; so that really there was but very little land left in the John Day Valley for the company to list.

Q. 89. You do not know personally do you what knowledge or notice P. J. Martin, or Edward Martin or Mr. Phelan, the purchasers of this stock, may have had at the time they purchased, as to what fraud had been perpetrated in procuring the certificates of the Governors, or any other fraud that may have been perpetrated in the matter, do you?

A. I dont think—

Q. 90. I am asking you of your own knowledge whether you know or not. I am not asking you what you think about it. You do not know what knowledge they had on the subject do you, one way or the other?

A. No, I don't know any knowledge only than they would not buy land if they expected that there was anything on it of that sort.

Q. 91. Who paid you the $6,250 you received for your stock?

A. P. J. Martin.

Q. 92. Did he pay the money to these other parties you have mentioned?

A. He made out checks and left the checks to be delivered to them; he delivered them in person to those who were there.

Q. 93. How long was he up there buying this stock?

A. Governor Curry was up there from the latter part of December until March 3, and Mr. Martin came up some time during that time and made these payments; he was there the best part of a week or two.

Q. 94. Was he out over the road or any part of it before he bought this stock?

A. I could not say; I think he had been through the country in connection with his business.

Q. 95. Well, at the time of that sale?

A. No; I think not.

Q. 96. He had not been over the country at that time?

A. No, I think not, because it was in the winter; but I am certain he has been prior to that time.

Q. 97. This purchase you say was made in the winter of 1875?

A. Yes.

Q. 98. How are the mountainous portions of this road as to snow. Is it covered with snow in the winter?

A. Well, the Camp Watson range is generally snowed over in the winter, and the Blue Mountain range is. There are streaks throughout that are covered with snow.

Q. 99. Neither Edward Martin nor Phelan nor any of these purchasers of stock were up there, were they, to make any investigation themselves about it before the purchase, were they?

A. I do not think Edward Martin or Mr. Phelan were.

Q. 100. Was you one of the original promoters of this Dalles Military Road Company?

A. I was not one of the original incorporators.

Q. 101. How did you get your stock?

A. I bought one of the others out.

Q. 102. What did it cost you?

A. I forgot now; he became indebted to us, and the exact amount I could not tell you.

Q. 103. Wasn't it less than $2,000?

A. No; it was more than that.

Q. 104. Where do you reside now, Mr. Grant?

A. I reside in Sherman County, Oregon.

Q. 105. Are you a resident of that place?

A. Yes.

Q. 106. Does your family live there?

A. I have no family.

Q. 107. You claim to be a citizen there—vote there, do you?

A. Yes, sir.

Q. 108. How long have you lived there?

A. I have lived in Oregon thirty odd years.

Q. 109. I mean at this place, Grant?

A. Since it was established; 14 years altogether.

Q. 110. Is that anywhere near this land grant?

A. Yes; within ten miles.

Q. 111. Where are the books of The Dalles Military Road Company now?

A. I do not know; everything was turned over to Edward Martin and James Phelan by the old company, and I presume they have them in their possession.

Q. 112. This stock was all bought up about the same time, was it?

A. Yes; well, seven-eighths of it was.

Q. 113. What about the balance?

A. Well, it was bought just as soon as the party could be reached.

Q. 114. Who succeeded you as secretary?

A. Judge C N. Thornbury.

Excused.

(Signed), WILLIAM GRANT.

Attest: GEO. H. DURHAM,
Examiner.

---

Counsel for defendants now offer in evidence the bill of complaint herein, excepting those parts which allege fraud and knowledge of fraud, and non-construction of the road, on the part of the defendants.

Counsel for complainants objects to a part of the bill being introduced without the whole bill, and counsel for complainants offers the whole of said bill in evidence.

To which offer counsel for defendants objects on the ground that it is not pertinent to the issues raised by the pleadings, so far as that portion is concerned which is not offered by defendants.

Examiner's Note—At this time it is agreed between counsel for the respective parties that the original bill filed in this cause may be deemed in evidence for the respective parties as by them offered, and this agreement is made to save the necessity of making copies to file as exhibits.

Whereupon the defendants rest.

And an adjournment was now taken without date.

GEO. H. DURHAM,
Examiner.

---

Monday, October 26, 1891.

At this time the parties to the above entitled cause appeared before me at my office, the complainant being represented by A. H. Tanner, of counsel, and the defendants by A. L. Frazer, Esq., their solicitor, whereupon the following proceedings were had, to wit:

Counsel for complainant now offers to call witnesses to show that the wagon road known as the Dalles military road, and

referred to in the bill in this suit was never built as required by the act of Congress, and that the certificate of the Governor that it was built and constructed was obtained by misrepresentation.

Counsel for the defendants objects to the introduction of that part of this testimony which refers to the building or construction of said road on the ground that it is immaterial and irrelevant for the purpose of controverting the matters contained in the plea, or the testimony introduced in pursuance thereof, and objects to that part of said testimony which refers to misrepresentation having been made in obtaining the certificate of the Governor that it was built and constructed, unless such misrepresentations were made by one or more of the officers, stockholders or agents of The Dalles Military Road Company, or by some other person or persons for or in its interest or behalf.

Whereupon Ad. Edgar was called and duly sworn as a witness on behalf of the complainant, and was interrogated as follows by complainant's counsel:

Q. State fully and at length all you know as to whether or not the wagon road known as the Dalles military road referred to in the bill in this suit was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificate of the Governor of Oregon that said road or portions thereof had been built were obtained.

Counsel for defendants objects to the first part of the question relating to the construction or building of said road, as irrelevant and immaterial to the issues made by the plea in this cause, and as immaterial for the purpose of answering any evidence taken in support of the plea, and for the further reason that the plea raises no issue upon the question of the construction of the road. And counsel objects to the latter part of said question relating to the manner of obtaining the certificate of the Governor of Oregon as to the building of said road, unless said certificate was obtained by fraud, misrepresentations or undue influence on the part of one or more of the officers, stockholders or agents of The Dalles Military Road Company, or by some other person or persons for or in its interest or behalf. And before an answer shall be made to the question of

counsel for the defendants requests the Examiner to certify the question to the Court for his opinion as to whether the question should be answered.

Examiner's Note.—Before taking the answer I will certify this question to the court as a question by counsel for defendant, for the purpose of taking the opinion of the court as to the relevancy and materiality of the testimony sought by the question referred to.

GEO. H. DURHAM,
Examiner.

November 26, 1891.

The court having sustained said objection, the complainant rests.

GEO. H. DURHAM,
Examiner.

DISTRICT OF OREGON—ss.

I, G. H. Durham, Examiner, do hereby certify that the witnesses named in the foregoing record was taken at the time, place and in the manner in said record shown; that before testifying each of said witnesses was by me duly sworn to tell the truth, the whole truth and nothing but the truth, and his testimony was thereafter taken in shorthand by a stenographer by me duly sworn for that purpose, and said shorthand notes were thereupon extended, and either subscribed by the witnesses respectively, or the shorthand notes thereof were by said witnesses respectively subscribed by consent of parties.

Witness my hand this 27th day of November, 1891.

GEO. H. DURHAM,
Examiner.

[Endorsed]: Filed November 27, 1891.

R. H. LAMSON, Clerk.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, R. H. Lamson, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered 1 to 241 inclusive, contain a full, true and complete transcript of the record of said court in the

cause wherein the United States is complainant and The Dalles Military Road Company et al. are defendants, as the same now appears of record in my office and under my custody and control.

In testimony whereof, I have hereunto set my hand and the seal of said Circuit Court at Portland, in said district, this March first, in the year of our Lord one thousand eight hundred and ninety-two.

R. H. LAMSON, Clerk.

(SEAL) By A. B. LAMSON, Deputy Clerk.

Endorsed: Transcript of Record on Appeal.

Filed March 4, 1892.

F. D. MONCKTON, Clerk.

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

THE UNITED STATES, Complainant.
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Martin, Ada B. Martin, Edward Martin, Barton L. Walker, Genevive E. Walker, and the Eastern Oregon Land Company, Defendants.

## Appearance for United States.

To the Clerk of the above entitled Court:

You will please enter our appearance as solicitors for the United States in the above cause.

FRANK P. MAYS,
ALBERT H. TANNER,
Solicitors for Complainant.

[Endorsed.] Filed, March 4, 1892.
F. D. MONCKTON, Clerk.

*In the United States Circuit Court of Appeals for the Ninth Circuit,*

No. 37, OCTOBER TERM, 1891.

THE UNITED STATES, Appellant,
*vs.*
THE DALLES MILITARY ROAD CO., ET AL.

## Appearance for Appellees.

The Clerk will enter my appearance as Counsel for the Appellees.

A. L. FRAZER.

[Endorsed:] Filed, April 18, 1892.
F. D. MONCKTON, Clerk.

At a stated term, to wit: the October term, A. D. 1891 of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the Court room, in the City and County of San Francisco, on Thursday, the twenty-first day of April, in the year of our Lord, one thousand eight hundred and ninety-two.

Present: HONORABLE WILLIAM B. GILBERT, Circuit Judge;
HONORABLE THOMAS P. HAWLEY, District Judge;
HONORABLE WILLIAM W. MORROW, District Judge.

---

THE UNITED STATES, Appellant,
*vs.*
THE DALLES MILITARY ROAD CO., ET AL. } No. 37.

---

## Order of Submission to Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Oregon.

Ordered appeal, argued by A. H. Tanner, Esquire, counsel for the United States, appellants, and A. L. Frazer, Esquire, counsel for the appellees, and submitted to the Court for consideration and decision.

---

*In the United States Circuit Court of Appeals, Ninth Circuit.*

THE UNITED STATES, Appellant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company, Appellees.

## Opinion of Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Oregon.

F. P. MAYS, U. S. Attorney for Oregon, and
A. H. TANNER, Special Assistant for Appellant.

JAMES J. KELLY and
A. L. FRAZER for Appellees.

Before GILBERT, Circuit Judge, and
MORROW and HAWLEY, District Judges.

HAWLEY, J.

This is a bill in equity instituted by the United States, in pursuance of the Act of Congress of March 2, 1889, (25 U. S. Stat. 850), to procure a decree of forfeiture of all lands granted by Congress to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise on the Snake River (14 U. S. Stat. 409), on the ground that the terms and conditions of the grant have not been complied with and that the certificate of the Governor of Oregon, upon which patents were issued for a portion of said lands, was procured through fraud.

The act granting said lands, among other things, provided: "That said road shall be constructed with such width, gradation and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe." (Section 3.)

"That lands hereby granted to said State shall be disposed of only in the following manner, that is to say: When the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States." (Section 5.)

The Legislature of the State of Oregon, on October 20, 1868, passed an act granting the said lands to the Dalles Military

Road Company, for the same purpose and upon the conditions and limitations prescribed in the Act of Congress (Stat. of Oregon, 1868, 3.)

On June 23, 1869, the Governor of Oregon gave the following certificate: "I, George L. Woods, Governor of the State of Oregon, do hereby certify that this plat or map of the Dalles Military Road has been duly filed in my office by the Dalles Military Road Company, and shows, in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an Act of Congress approved February 25, 1867, entitled 'An Act granting lands to the State of Oregon to aid in the construction of a Military wagon road from Dalles City on the Columbia River to Fort Boise on the Snake River, and with the Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, entitled: 'An Act donating certain lands to Dalles Military Road Company.' I further certify that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by the said above recited Acts, and that said road is accepted * * * * Geo. L. Woods."

On May 31, 1876, the Dalles Military Road Company sold and conveyed the lands granted by said Acts of Congress and State of Oregon to Edward Martin for the sum of $125,000, the deed conveying this land was a bargain and sale deed. By divers deeds of like character by and through various other parties the lands were thereafter conveyed to the defendant, the Eastern Oregon Land Company.

In October, 1889, the Circuit Court, in considering the exceptions of defendants to certain portions of the bill, properly held: (1) that the Acts of Congress and of the State of Oregon constituted the entire statutory contract with the Dalles Military Road Company and that the Statute of Oregon, approved October 14, 1862, relative to the construction of roads by private corporations, having been passed without any reference to this specific grant, did not in any manner affect the question as to whether or not the road had been constructed in the manner and within the time prescribed by the Act of Congress, (2)

that, there not being anything in either of the Acts granting this land, requiring the Road Company, or any person claiming under it, to maintain the road after it had been completed and accepted by the Government in accordance with the provisions of said Acts without any fraud, or notice of any fraud, to vitiate the acceptance, the rights of the Dalles Military Road Company and those claiming under it vested irrevocably upon such acceptance against the United States. (United States v. Dalles Military Road Co., 40 Fed. R., 114).

The defendants Henarie, Martin and the Eastern Oregon Land Company, by leave of the Court, filed two pleas to the bill, supported by an answer, (1) that the issuance of the certificate of the completion of the road by the Governor, was without any false or fraudulent representation on the part of the Dalles Military Road Company, or any one in its interest or behalf; (2) that the defendants purchased the lands in question, in good faith, for a valuable consideration without notice of any fraud. These pleas were set down for argument as to their sufficiency. The Court held that both pleas were sufficient in law and dismissed the bill without given the United States, as complainant, any opportunity to reply. (United States v. Dalles Military Road Company, 41 Fed. R., 493). An appeal was thereupon taken to the Supreme Court of the United States, and the Court after giving a detailed statement of the facts and discussing certain features of the case, said that "the decree must be reversed in so far as it dismisses the bill, and the case be remanded to the Circuit Court, with a direction to allow the plaintiff to reply to, and join issue on the pleas." (U. S. v. Dalles M. R. Co., 140 U. S., 599). When the case came back a decree was regularly entered as directed by the Supreme Court, and in due time, replications to said pleas were filed. Thereafter, by leave of the Court, both pleas were amended by setting out more specifically the facts upon which said pleas were based.

The first alleges among other things that the Governor of Oregon, "without any false or fraudulent representations having at any time been made to him by the officers, stockholders or agents of The Dalles Military Road Company, or any other person or persons in its or their interest, and without any one

or more of them having falsely or fraudulently induced him to certify that the road of said Company was constructed in accordance with law, on the 23d day of June, 1869, issued in favor of said Company," the certificate heretofore quoted in full.

It further alleges the sale of the road to Edward Martin for a valuable consideration, and from Edward Martin and others to the Eastern Oregon Land Company.

The second plea sets out the issuance of the certificate by the Governor, the withdrawal from sale of the lands by the Commissioner of the General Land Office on the 18th of September, 1869; the Act of Congress approved June 18, 1874, "authorizing the issuance of patents for lands granted to the State of Oregon in certain cases," (18 U. S. Stat., 80); alleges "that Edward Martin then a resident of San Francisco, in the State of California, placing confidence in the truth of the Certificate of the Governor of the State of Oregon, * * * that the said road had been duly constructed according to the requirements of the said Act of Congress * * * and also placing confidence in the order of the Commissioner of the General Land Office * * * withdrawing the said lands from sale in favor of The Dalles Military Road Company; and also believing that the said Act of Congress, approved June 18, 1874, would be carried into effect by issuance of patents to Dalles Military Road Company for all of said lands, did, on the 31st day of May, 1876, purchase in good faith for a valuable consideration * * * all the lands embraced in the grant to said Company, except such portions thereof as had been previously sold by it, that previous to the time of paying the sum of $125,000— purchase money and receiving said deed, the said Edward Martin had no notice of any failure on part of The Dalles Military Road Company, to construct and complete the said road, in accordance with the requirements of said Act of Congress, approved February 25, 1867, and he had no reason to believe that the same was not constructed in accordance with the said Act of Congress, but, on the contrary, he was informed and believed that said road had been constructed with such width, gradation and bridges as to permit of its regular use as a wagon road; that, thereupon the said

Edward Martin became and was the *bona fide* purchaser for a valuable consideration of all said lands then owned by The Dalles Military Road Company, which were then conveyed to him by said Corporation." The plea then alleges the sale of certain interests in said lands, and the various *mesne* conveyances made at different times without notice of any fraud, and that the Eastern Oregon Land Company now holds the legal title to all the said lands granted by the Act of Congress, except such as have heretofore been sold to other parties.

When the case upon these pleas was called before the examiner, the United States introduced a witness by whom they offered to prove that the road had not been constructed or completed as required by law. The defendants objected to this character of testimony upon the ground that the burden of proof to establish the truth of the pleas, being on the defendants, they should first be allowed to introduce their testimony, and upon the further ground that testimony as to the construction or non-construction of the road was not pertinent to the issues raised by the pleas and replication. The objection having been certified to the Court was sustained.

After the testimony for the defendants was completed, the United States again offered to prove that the road had never been constructed, and that the certificate of the Governor certifying to its completion was procured by fraud and false representations. Defendants thereupon objected to any testimony being given as to the non-construction of the road on the ground that it was immaterial, and not pertinent to any issues raised by the pleas, and objected to any testimony offered as to fraud and false representations being used to procure the Governor's certificate for these reasons, unless it was first shown or was intended to be shown that the fraud or false representations were made or used by the defendant, The Dalles Military Road Company, its officers, stockholders or agents, or by some one for it or in its behalf. These objections were likewise sustained by the Court.

The Dalles Military Road Company and James K. Kelly, its President, and C. N. Thornbury, its Secretary, on October 25, 1889, filed their separate answer to each, and every paragraph of the bill, and therein alleged that the road was con-

structed, in all respects, as required by law, without any fraud, and gave at great length the particular manner and time of its construction and completion. They affirmatively allege, among many other things, that in March, 1869, the Dalles Military Road Company "had a continuous road from Dalles City on the Columbia River to Fort Boise on the Snake River, over which teams of eight or ten horses or mules, or five yoke of oxen could and did pass over the entire length of said road * * * hauling as much as five tons of freight at a load; that it was constructed with such width, gradation and bridges as to permit of its regular use as a wagon road," that the Governor of Oregon, at the time of the execution of his certificate, well knew from an examination made by him, "and by good and sufficient proof from reliable persons examined by him, that the said road was constructed in all respects as required by the Act of Congress," and was fairly accepted by him; "that the road was so constructed as to permit the transportation of property, troops and mails of the United States over the same and * * * was so used when said road was accepted by the Governor."

No replication was ever filed to this answer, and on November 27, 1891, the Court, upon motion of defendant's counsel, dismissed the bill as to said defendants, under the Provisions of Equity Rules 61 and 66, for failure of complainant to file a replication. Thereafter complainant moved the Court to set aside said order of dismissal on the ground, among others, that the reply filed to the pleas of the other defendants was a sufficient replication to said answer, and if not, that leave be granted to file a replication *nunc pro tunc*, which motion was denied.

On December 7, 1891, the pleas of the defendants, the Eastern Oregon Land Company, Henarie and Martin came up for hearing, and the Court held that the pleas were sustained by the evidence and dismissed the bill as to said defendants. From the orders of the Court dismissing the bill, complainant appeals to this Court.

This case, in nearly all of its essential features, presents precisely the same questions that were decided by this Court in United States v. California and Oregon Land Co., 49 Fed. R., 496; and upon the authority of that case the judgment of the

Circuit Court should be affirmed. But, inasmuch, as the questions involved are claimed to be of vital importance to many persons in Oregon who have settled in that portion of the State where the lands granted are located, and at whose instance the authority of Congress was obtained to institute this suit, as well as of great interest to the parties to the suit, we have deemed it proper to more fully state the facts, and to again review, more in detail, some of the various legal propositions that have been so ably and thoroughly discussed, by the respective counsel, in both cases.

There is really but one question involved in this case, viz: Are the pleas sustained by the evidence? It is, however contended that the Act of Congress authorizing this suit to be brought, required a full and complete investigation of all the facts presented by the bill, and that the decision of the Supreme Court in this case, recognized that right when it reversed the decision of the Circuit Court.

It is true that the Act of Congress authorized the suit to be brought "to determine the questions of the reasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the Governors of the State of Oregon, of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the Court is hereby authorized to render, declaring forfeited to the United States all such lands * * * which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration, if any such there be." (25 U. S., 851.)

The object of this Act was to have a hearing in the Courts, upon all the legal issues that might be presented by the pleadings. As was said by the Supreme Court: "It is manifest that, although the Act says that suits are to be tried and adjusticated in like manner, and by the same principles and rules of jurisprudence as other suits in equity, Congress intended a full and legal investigation of the facts, and did not intend

that the important interests involved should be determined upon the *untested* allegations of the defendants." United States v. Dalles Military Road Co., 140 U. S., 631.

The issues raised by the pleas should be tried. The United States was entitled to file a replication thereto. Was entitled to have all the facts having any legitimate bearing upon the truth or falsity of the pleas determined by the Courts, and the Court erred in dismissing the bill without allowing the United States to have such a hearing. The decision of the Supreme Court is unquestionably correct, and it has been strictly followed by the Circuit Court in this case; the merits of the pleas have been investigated. The decision of the Supreme Court recognized the sufficiency and validity of the pleas. This is manifest from the language of the opinion: "We are of opinion that the Circuit Court erred in not permitting the plaintiffs to reply to the pleas, and in dismissing the bill absolutely. It is provided by Rule 33, of the Rules of Practice in Equity, that the plaintiff may set down a plea to be argued, or may take issue upon it. This does not mean that the plaintiff is to make thereby such a conclusive election that, if he sets down the plea to be argued, and it is sustained, on the argument, he cannot afterwards take issue on it. By Rule 34, on the overruling of a plea on hearing, the defendant has a right to answer the bill. The object of having a plea set down for hearing is to induce the presentation to the Court, as a question of law, of the matters set up in the plea, so that assuming those matters to be true in point of fact. "*The whole controversy may, perhaps, be determined as a question of law* * * * Various matters of fact are alleged in the pleas, which the plaintiffs have a right to controvert, such as that there were no fraudulent representations made to the Governor; that he made the certificate without any fraud on his part; that Martin was a *bona fide* purchaser for a valuable consideration, without notice; that Henarie was likewise, and that the subsequent grantees were such *bona fide* purchasers." (140 U. S., 616, 617.)

The cases were sent back to be tried upon the issues raised by the pleas. If the plea of being *bona fide* purchasers was found good then the bill should be dismissed, If under the facts it was found to be untrue, then the parties would still

have the opportunity to try the case upon the other allegations of the bill and answer, and have it determined whether or not the road was in fact built as required by law. This is in accordance with the plain provisions of the Act of Congress and of the language used by the Supreme Court with reference thereto. Are the pleas sustained by the evidence? Before reviewing the evidence, several preliminary questions discussed by counsel will be disposed of.

Is the certificate of the Governor defective? Does it comply with the provisions of the Act of Congress? Did the Court err in excluding the evidence offered by the United States to show that the certificate was obtained by fraud? Are the subsequent purchasers charged with any notice by any of the conditions in the various Acts of Congress, or of the State of Oregon? Are the deeds conveying the land to the subsequent purchasers of such a character as to allow them to rely upon their plea of being *bona fide* purchasers for value?

The Act of Congress does not prescribe any particular form in which the Governor's Certificate shall be issued. "When the Governor of the State shall certify * * * that any ten continuous miles of the said road are completed then another quantity of land hereby granted, not exceeding thirty sections, may be sold and so on from time to time until the said road is completed." The fact that the Governor's Certificate was not given upon the completion of each section of ten miles does not effect its validity. The corporation defendant might have required the Governor to examine and certify to the completion of each ten miles of the road, as it progressed so as to enable it to get certain lands from the sale of which they might obtain sufficient means to build other sections of the road; but it certainly lost no rights by waiting until the road was fully completed for the entire distance. It would be manifestly unjust to hold that the parties completing the road with their own means could not be entitled to the benefits of the grant because the Act stated that the lands should only be disposed of as provided in the Act upon the completion of each ten miles, and that the granted lands "shall be exclusively applied to the construction of said road, and to no other purpose; and shall be disposed of only as the work progresses."

If an owner of a town lot should make a contract with a contractor to construct a building upon said lot and agree to make payments every thirty days as the work progressed, said payments to be made upon the certificate of a supervising architect that a certain amount of materials had been used or labor performed, and that the amount of the payments should only be used for the purpose of paying for the materials and for the labor, and that after such contract was entered into the contractor, bought and paid for all the materials and paid for the labor, and made no demand for payment until the building was fully completed according to the contract. Would the Courts entertain a defense of the owner of the lot that nothing was due because the payments were only to be made as provided for in the contract, and the certificate of the architect only set forth the fact that the building had been completed as required by the contract?

Certainly not. A bare statement of the facts is a sufficient answer to the argument of counsel. It is absolutely devoid of merit. It is claimed that the language of the Certificate of the Governor that he has "made a careful examination of the said road since its completion, and that the same is built in all respects as required by the above recited Acts and that said road is accepted," is not in compliance of the Act of Congress of June 18th, 1874, in that it does not certify that the road has been "constructed and completed."

The certificate of the Governor in this respect, is not defective. It would be a play upon words, a reliance of mere form instead of substance as to the meaning of words, to hold that the use of the word *built* as used in the certificate is not equivalent to the word *"constructed"* as used in the Act of Congress, and, in this connection it is difficult to see how it can, with any degree of consistency, be claimed that the certificate of the Governor does not show that the road had been completed. How could he have certified that he examined the road "since its completion," and that the same was built in all respects as required by law unless it was constructed and completed as required by the Act of Congress?

The certificate substantially conforms to all the requirements of the Acts of Congress. Another alleged suspicious circum-

stance is mentioned and relied upon by counsel. The Statute of Oregon granting this land, was approved October 20th, 1868, and the certificate of the Governor was made July 23, 1869. This short period of time is said to be such a striking thing that it could not have "escaped the attention of the purchasers if, as they claim, they relied upon it when they made the purchase." Our attention has not been called to any provision in any of the Acts prohibiting any work being done by anybody upon the road until after the grant is made to some person or corporation by the State of Oregon. The certificate of the Governor does not state that the road was built in eight months—the time intervening after the lands were granted by the State, before the certificate was given. For aught that appears in the Acts of Congress, the Act of Oregon, or the Certificate of the Governor, the road might have been fully constructed and completed before the last mentioned Act was passed and if this were true it would not effect the validity of the grants, or of the certificate of the Governor.

Whatever the facts may be, it is enough to say that the purchasers were not put upon any notice to ascertain at what particular time, or within what particular time the road was built. The Governor's certificate being valid and sufficient upon its face, did the Court err in excluding the evidence offered to show that it was obtained by misrepresentation and fraud? No objection was made to any evidence which the United States might offer to show that any fraud was committed by the Dalles Military Road Company, its officers, stockholders or agents, or by any person in its or their behalf. No offer was made to make any such proof. It was not proposed by the United States to, in any manner connect the Dalles Military Road Company, or any of the other defendants, with any fraud or misrepresentation, or to show that it or they, or either of them, had any knowledge or notice of any fraud in this respect.

What was the use of taking up the time of the Court, or its officers, in taking testimony that was wholly and manifestly irrelevant to any issue in this case? The defendants could not be held responsible for any fraud or misrepresentation committed by others, if any was committed by anybody unless it

was proposed to show that they had knowledge thereof or were in some manner legally bound thereby.

The objection to the evidence as offered, was properly sustained.

The Court did not err in excluding the testimony offered by the United States to show that the road had never been built as required by the Act of Congress. The answer to the argument of counsel is found in the Act of Congress granting the lands. This Act declared what should be considered conclusive evidence as to the building and completion of the road. The purchasers had the right to rely upon such evidence and to act upon it if there was no fraud, or no notice of any fraud, upon their part. What further facts were legally necessary for them to inquire into? The Act itself declared, designated and determined the kind, character and nature of the proof that would be sufficient to establish the fact of the construction and completion of the road.

In 1874, five years after the certificate of the Governor was given, Congress passed an Act which, after reciting the facts that certain lands had been theretofore granted by Congress to the State of Oregon to aid in the construction of certain military roads in said State, and that there existed no law for the issuing of formal patents for said lands, provided: "That in all cases when the roads in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon, as in said Acts provided to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the general land office to such corporation or corporations." (18 U. S. Stat., 80.)

All that was required by this Act was the fact that the Governor of Oregon had issued a certificate that the road had been constructed and completed, as in said Acts provided. The wisdom of such a provision is not the subject of discussion. Congress created the witness and declared that his testimony in the shape of a certificate would be sufficient evidence that the

road had been built. When this proof was presented it furnished all the testimony which reasonable, prudent and careful business men, acting in good faith, without any knowledge or notice of any fraud, were required to examine. Congress authorized patents to issue upon such proofs, and the officers of the Government of the United States, prior to the sale of the lands to the defendants in the pleas, had issued patents upon such proofs to a portion of the lands specified in the grants. In the light of all these facts the purchasers certainly had the right to rely upon the good faith of the Government of the United States, and to act upon the certificate and repose confidence in the truth of the facts therein stated, and were not required to go behind such proofs and personally inspect and examine the road to see whether or not said certificate was false before purchasing the lands. There is no evidence in this case tending, in the slightest degree, to show that the purchasers had designedly abstained from making any inquiry as to the construction and completion of the road for the purpose of avoiding any information or knowledge. The authorities cited by appellants, touching the responsibility of parties under such circumstances, have no application whatever to the facts of this case.

It is argued here as it was in United States v. California and Oregon Land Co., *supra*, that the deed from the Dalles Military Road Co. to Martin was a quit claim deed, and for that reason the defendants were put upon enquiry as to the title and are not entitled to maintain their pleas of being *bona fide* purchasers for value. The facts do not support the argument of counsel. The deed, as we have already said, was a bargain and sale deed reciting that the company in consideration of the sum of $125,000 to it in hand paid, has granted, bargained and sold, released and conveyed, and by these presents it does grant, bargain, sell, release and convey, unto the said party of the second part, his heirs and assigns, all the lands lying and being in the State of Oregon, granted or intended to be granted to said State by Act of Congress, approved February 25th, A. D. 1867, * * * and the right to a patent or patents for said lands granted to said party of the first part by Act of Congress, approved June 18th, 1874,

* * * which said lands were granted * * * by the State of Oregon to the said Dalles Military Road Company, * * * which said several Acts are hereby made part hereof, and all the right, title and interest acquired, or to be acquired by the party of the first part under the said several Acts hereinbefore referred to, or either of them. * * * It being the intention of the party of the first part to convey and it does hereby convey to the party of the second part the said lands. * * * To have and to hold the lands hereby granted, and every part and parcel thereof unto the said party of the second part his heirs and assigns forever." There is nothing in the form or language of this deed to imply in the slightest degree, that the conveyance was only of the speculative right, title and interest of the corporation.

The other deeds to the other defendants are of the same character. It is in this connection claimed that, because Martin first procured the shares of stock of the corporation before the deed was executed, no consideration was paid for the deed, and that for this reason the defendants are not *bona fide* purchasers. The truth is, as shown by the testimony, that Martin, acting under the advice of counsel, procured the legal title to the stock of the corporation, as well as a deed direct from the corporation for the purpose of preventing any question as to the validity of the title to the lands.

There is nothing in the deed, nor in the manner in which it was obtained, nor in any of the facts relating to the purchase which legally deprives the defendants, or either of them, from asserting or maintaining their rights under the plea being *bona fide* purchasers for value.

The testimony clearly shows that full value was paid for the lands; that before the purchase was made an abstract of title was prepared by competent persons and the opinions of able attorneys, as to the validity of the title procured; that every precaution, as ordinarily exercised by cautious, careful and prudent men was observed in order to ascertain whether thetitle was valid; that neither Martin or either of the other purchasers had any knowledge, notice or suggestion of any kind, character or nature whatever, that the road had not been constructed or completed as required by the Acts of Congress or of the Act of

the State of Oregon, or that there was any fraud in obtaining the Governor's Certificate that it was so constructed and completed; that no notice was given or claim made to them, or either of them, or to any person to their knowledge, that the United States, or any person or corporation except the Dalles Military Road Company and its grantees, had any claim or ownership to the lands or any part thereof.

Every living witness who was in any way or manner connected with the sale or purchase of the property, or was in a position to have known the facts, was examined by the defendants. No offer was made to contradict their testimony. C. N. Thornbury, who was Secretary of the Dalles Military Road Company at the time the deed was made to Martin, and an old resident of the Dalles, testified that there had not been at the time of the sale any public talk or claim of fraud in the matter of the Governor's Certificate of the construction of the road to his knowledge, and that he would have been likely to have heard of it if there had been any such talk; that he had not at that time, or at any other time prior thereto, ever heard that any one questioned the validity of the title of the Dalles Military Road Company, or that there was any suspicion of fraud in procuring the Governor's Certificate, or in any of the tranactions of the company.

The testimony of William Grant who was Secretary of the Company prior to Thornbury, and had lived in the State of Oregon for over thirty years, and at Grant, Oregon, within ten miles for the land grant for 14 years, is to the same effect.

P. J. Martin who acted as the agent of his brother Edward Martin, and Mr. Phelan in making the purchase, testified fully in regard to all the transactions with the corporation and its stockholders. The following questions and answers illustrate the general character of his testimony.

"Q.—Mr. Martin, prior to the time and at the time of your purchase of these lands for your brother and Mr. Phelan, as you have narrated, had you heard any claim or assertion that there was fraud in the construction of the Dalles Military Road, or in procuring the Governor's certificate, that the same had been constructed or in procuring the President of the United States to patent part of these lands, or the Secretary

of the Interior to list the same, or had you any information that would lead you to believe or suspect that there had been fraud in any of these acts?

A.—None whatever: I never heard anything against the title, or anything different at the time, and I certainly must have heard of it if there was any such a report abroad; I never heard anything going about, or anything against the title." * *

"Q.—At the time you acquired this interest, did you have any knowledge or information that would lead you to believe there was fraud in the construction of this road, or in procuring the Governor's certificate?

A.—Why certainly not, or I would not have paid my coin for it." * * *

"Q.—Now, you may state, if at any time this property was transferred to the Eastern Oregon Land Company, any of the incorporators of that company, or the stockholders therein, to your knowledge had any information of any fraud in the construction of this road, or in the procuring of the Governor's certificate of the completion of the road, or in procuring the listing of the lands by the Secretary of the Interior, or the issuing of patents on a part of the same by the President of the United States, or any fraud whatever connected with the business?

A.—None whatever, that I ever heard of, near or remote."

Edward Martin is dead. James Phelan's testimony, and that of every other living witness who had anything to do with the transaction, is to the same effect. It, therefore affirmatively appears that the defense of *bona fide* purchasers was established by competent and sufficient evidence, under the general Rules of Equity practice, and the saving clause in the Act of Congress, authorizing the commencement and trial of this and other causes.

It is apparent that it would have been an idle, useless and expensive waste of time and means to have gone into the inquiry as to whether each and every mile of the 330 miles of road, or of any part of it, had ever been constructed or completed. That fact was wholly immaterial to the truth of falsity of the pleas. The question as asked and the offers as made by counsel for the United States, were wholly irrelevant

to any issue raised by the pleas. The Court did not err in sustaining the objections of defendants thereto. In view of these conclusions it is immaterial whether the Court erred in refusing to allow the complainant to reply to the answer of the Dalles Military Road Company, or in dismissing the bill as to it.

The judgment of the Circuit Court is affirmed.

[Endorsed]: Filed July 18, 1892.

F. D. MONCKTON, Clerk.

---

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 37, OCTOBER TERM, 1891.

THE UNITED STATES, Appellants,
*vs.*
THE DALLES MILITARY ROAD COMPANY, ET AL.

---

## Decree of Circuit Court of Appeals

### Appeal from the Circuit Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, and the cause is remanded to said Circuit Court for such further proceedings as may be necessary in accordance with the opinion of this Court.

[Endorsed:] Filed, July 18, 1892.

F. D. MONCKTON, Clerk.

At a stated term to-wit: the October term A. D., 1891 of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the Court room, in the City and County of San

Francisco, on Thursday, the Twenty-eighth day of July, in the year of our Lord, one thousand eight hundred and ninety-two.

Present: HONORABLE JOSEPH McKENNA, Circuit Judge;
HONORABLE WILLIAM B. GILBERT, Circuit Judge;
HONORABLE HIRAM KNOWLES, District Judge,

THE UNITED STATES, Complainant,
*vs.*
THE DALLES MILITARY ROAD COMPANY, D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company, Defendants. } No. 37.

---

## Order Allowing Appeal to Supreme Court, U. S.

Now at this time comes Mr. A. H. Tanner of Counsel for the United States in the above entitled suit, and gives notice in open Court of an appeal in said cause to the Supreme Court of the United States, and prays that an appeal may be allowed in said cause to the Supreme Court of the United States, from the decree of this Court affirming the decree of the Circuit Court of the United States for the District of Oregon.

It is therefore ordered by the Court that the United States, Complainant and Appellant herein, be allowed an appeal in this cause from the said decree of this Court to the Supreme Court of the United States.

---

## Certificate of Clerk of Circuit Court of Appeals.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing pages, numbered 1 to 252 inclusive, to be a full, true and correct copy of the record and of all proceedings in the cause entitled The United States, Appellants v. The Dalles Military Road Company, et al, No. 37, and that the same

together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said Circuit Court of Appeals, this 15 day of August, A. D. 1892. F. D. Monckton Clerk.

(Seal)

## Citation from Circuit Court of Appeals to Supreme Court, U. S.

UNITED STATES OF AMERICA, ss.

*The President of the United States,*

To The Dalles Military Road Company, D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company.

*Greeting*:—You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, on the 26th day of September next, pursuant to an order allowing an appeal entered in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of said United States Circuit Court of Appeals entered on the 18th day of July, A. D. 1892, and in which said order allowing appeal, the United States are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said United States, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 28th day of July, A. D. 1892.

(Signed) W. B. GILBERT,
U. S. Circuit Judge for the Ninth Circuit.

(Endorsed):

UNITED STATES OF AMERICA, } ss.
District of Oregon. }

Due and legal service of the within citation is hereby admitted and acknowledged at Portland, in said District, this 1st day of August, 1892.

A. L. FRAZER,
Of Attorneys for Appellees.

Filed August 3, 1892.
F. D. MONCKTON, Clerk.

148 U.S. 49

Office Supreme Court U. S.
FILED.
JAN 5 1893
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, Appellants,

*vs.*

THE DALLES MILITARY ROAD CO., THE EASTERN OREGON LAND CO. et al.

No. 1159.

# BRIEF FOR APPELLEES.

JAMES K. KELLY,
Solicitor for Appellees.

Press of McGILL & WALLACE, Washington, D. C.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, Appellant,

*vs.*

THE DALLES MILITARY ROAD COMPANY, THE EASTERN OREGON LAND COMPANY, *et al.*

No. 1159.

## BRIEF FOR APPELLEES.

This is a suit brought by the United States to declare a forfeiture of lands granted by Congress to the State of Oregon to aid in the construction of a military wagon road and for the cancellation of patents issued therefor, on the ground that the terms of the grant have not been complied with, and that the certificate upon which patents were issued was procured through the fraudulent representations of the officers, stockholders, and agents of the defendant, The Dalles Military Road Company, the grantee from the State of the said lands, and upon the further ground that the governor acted fraudulently in certifying the completion of the road.

Briefly, the facts are these:

On February 25, 1867, Congress granted to the State of Oregon certain lands to aid in the construction of a military wagon road by the following act:

CHAP. LXXVII.—An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia river, by way of Camp Watson, Cañon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided,* That the lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose, and shall be disposed of only as the work progresses: *And provided further,* That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress, or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further,* That the grant hereby made shall not embrace any mineral lands of the United States.

SEC. 2. *And be it further enacted,* That the lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

SEC. 3. *And be it further enacted,* That said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

SEC. 4. *And be it further enacted,* That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act.

SEC. 5. *And be it further enacted,* That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States.

SEC. 6. *And be it further enacted,* That the United States surveyor-general for the district of Oregon shall cause said lands so granted to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect.

Approved February 25, 1867.

14 Stats., 409.

On October 20, 1868, the State of Oregon granted the lands specified in the act of Congress of February 27, 1867, to The Dalles Military Road Company by the following act:

AN ACT donating certain lands to Dalles Military Road Company.

Whereas at the second session of the Thirty-ninth Congress that body passed an act entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia river, to Fort Boise, on the Snake river," approved February 25, 1867, as follows:

(Here appears the act of Congress referred to.)

*Be it enacted by the legislative assembly of the State of Oregon:*

SECTION 1. That there is hereby granted to Dalles Military Road Company, incorporated, as it appears by the articles of incorporation filed in the office of the Secretary of State on the 30th day of March, 1868, all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this State by the act of Congress in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed.

SEC. 2. There is hereby granted and pledged to said Dalles Military Road Company all moneys, lands, rights, privileges, and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes and upon the conditions mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing said road.

SEC. 3. The said Dalles Military Road Company is hereby authorized to locate the lands mentioned in the fourth section of the above-recited act subject to the approval of the governor.

Approved October 20, 1868.

Session Laws of 1868, p. 3.

The Dalles Military Road Company proceeded to construct its road in accordance with the acts of Congress and the State of Oregon as set forth in the answer of The Dalles Military Road Company on pages 38–49 of this brief.

Thereupon the Governor of Oregon certified that such road was duly constructed as follows:

EXECUTIVE OFFICE,
SALEM, OREGON, *June 23, 1869.*

I, George L. Woods, governor of the State of Oregon, do hereby certify that this plat or map of The Dalles Mil-

itary Road has been duly filed in my office by The Dalles Military Road Company, and shows, in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an act of Congress approved February 25, 1867, entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City on the Columbia river to Fort Boise on Snake river," and with the act of the legislative assembly of the State of Oregon approved October 20, 1868, entitled "An act donating certain lands to Dalles Military Road Company." I further certify that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by the said above-recited acts, and that said road is accepted.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon.

Done at Salem, Oregon, June 23, 1869.

GEORGE L. WOODS.

Attest: SAMUEL E. MAY,
[SEAL] *Secretary of State.*

On June 18, 1874, Congress passed the following act in relation to land grants to aid in the construction of military wagon roads in Oregon:

AN ACT to authorize the issuance of patents for lands granted to the State of Oregon in certain cases.

Whereas certain lands have heretofore by acts of Congress been granted the State of Oregon to aid in the construction of certain military wagon roads in said State, and there exists no laws providing for the issuing of formal patents for said lands: Therefore,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the

State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled.

Approved June 18, 1874. (18 U. S. Stat., 80.)

In the spring of 1875, Edward Martin, now deceased, purchased from The Dalles Military Road Company, for himself, James Phelan, and D. V. B. Henarie, the whole of said land grant, and paid therefor the sum of $125,000. And on the thirty-first day of May, 1876, said company, by its deed of bargain and sale, conveyed said lands to said Edward Martin. By sundry other deeds the lands have since been conveyed to the defendant, the Eastern Oregon Land Company. These deeds are all set out in full in the bill of complaint.

See printed Record, pp. 25–37.

This suit is brought in pursuance of an act of Congress of March 2, 1889, which act provides that suits shall be brought "to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts either in whole or in part, *the legal effect of the several certificates of the governors of the State of Oregon, of the completion of said roads*, and the right of resumption of such granted lands by the United States, and to obtain judgments (which the

court is hereby authorized to render) declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, *saving and preserving the rights of all bona fide purchasers of either of said grants or of any portions of said grants for a valuable consideration, if any such there be.*" The act further provides that such suits "*shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are tried therein.*"

Stats. U. S., 1888–89, p. 950.

Under the authority of this last act, this suit was begun in August, 1889.

The bill of complaint alleges the substance of the several acts of Congress and of the legislature of Oregon above referred to. It further alleges that the Road Company, defendant, is incorporated under the general incorporation laws of Oregon. That long prior to the road grant by Congress, the legislature of Oregon, on October 16, 1862, passed "An act providing for private incorporations and the appropriation of private property therefor," which, among other things, provided that any road, other than a railway constructed by a corporation formed under said law, should be cleared of standing timber of a width of thirty feet on each side of the same, and should be otherwise constructed in the manner particularly provided for in the act—this last

act being a part of the general toll-road laws of Oregon, and still in force. (§§ 29, 30, Miscellaneous Laws of Oregon, chap. 7, compilation of 1872, p. 511.) It is also alleged that the aided road was never built in whole or in part, and that it was not and *has not been maintained as a public* highway by the defendants or by any person claiming any interest in the lands granted. That the governor of Oregon certified that the roads had been completed as required by the acts of Congress.

The governor is charged with having acted fraudulently, through the procurement of the officers, agents, and stockholders of The Dalles Company.

See printed Record, p. 7.

It appears from the bill of complaint that the certificate of the governor of Oregon, certifying the completion of the road, was issued June 23, 1869. And it also appears that the Secretary of the Interior has certified and issued patents for a large part of the grant. The bill charges that the present holders of the grant, at the time of the execution and delivery of the deeds to them, had full knowledge that the road provided for in said act of Congress had not been constructed as required by said act of Congress.

Printed Record, p. 11.

Exceptions were sustained to so much of the bills as allege the act of the legislature of Oregon providing for private incorporations, and as to the manner in which roads constructed by them shall be built, and to so much

of the bills as charge that the defendants have failed to *maintain* the roads provided for.

Printed Record, pp. 50–60.

The defendants, The Eastern Oregon Land Company, D. V. B. Henarie, Eleanor Martin, and P. J. Martin, by leave of the court, filed two pleas to the bill, supported by an answer, which alleges:

*First*—The issuance of the certificate of the completion of the road, by the governor of the State of Oregon, without any false or fraudulent representations on the part of The Dalles Military Road Company, or anyone in its interest or behalf.

*Second*—The purchase of the lands by them, in good faith and for a valuable consideration, without notice of the fraud charged in the bill or of any fraud.

On motion of attorney for the Government these pleas were set down for argument. Upon the hearing the Circuit Court held the pleas sufficient in law, and on February 18, 1890, ordered the bill dismissed without giving the United States an opportunity to reply.

The complainant thereupon appealed to the Supreme Court of the United States.

On the hearing of the cause in the Supreme Court on June 8, 1891, it was ordered and decreed that "the decree of the Circuit Court be and the same is hereby reversed *in so far as it dismisses the bill*," and the cause was

remanded to the court below with a direction that the decree of the Circuit Court, so far as it dismisses the bill, be reversed, and that the plaintiff be allowed "*to reply to and join issues on the pleas.*"

Accordingly the cause was returned to the Circuit Court, a decree was entered as directed by the mandate of the Supreme Court, and a replication to the pleas was filed.

Afterwards and before trial, by leave of the court, the pleas and answer were amended.

Following are the amended pleas:

## Amended Pleas.

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, Plaintiff,

*vs.*

THE DALLES MILITARY ROAD COMPANY, JAMES K. KELLY, C. N. THORNBURY, ELEANOR MARTIN, P. J. MARTIN, D. V. B. HENARIE, MARY A. HENARIE, T. J. MARTIN, MARGARET A. MARTIN, JAMES V. MARTIN, THOMAS S. MARTIN, ADA B. MARTIN, EDWARD MARTIN, BARTON L. WALKER, GENEVIEVE E. WALKER, AND THE EASTERN OREGON LAND COMPANY, Defendants.

The joint and several amended pleas and accompanying amended answer of the defendants, D. V. B. Henarie, Eleanor Martin, P. J. Martin, and the Eastern Oregon Land Company, defendants to the bill of complaint of the United States, complainant.

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form

as the same are thereby and therein set forth and alleged for plea to the whole of the said bill, or to so much and such part of the said bill as prays that the land granted to the State of Oregon by the act of Congress of date February 25, 1867, and now owned by these defendants, be decreed forfeited to the United States, say:

*First Plea.*

That George L. Woods, then the governor of Oregon, without any false or fraudulent representations having at any time been made to him by the officers, stockholders, or agents of The Dalles Military Railroad Company, or any other person or persons in its or their interest, and without any one or more of them having falsely or fraudulently induced him to certify that the road of said company was constructed in accordance with law (on the twenty-third day of June, 1869), issued in favor of said company a certificate in the following words and figures, to wit:

EXECUTIVE OFFICE,
SALEM, OREGON, *June 23, 1869.*

I, George L. Woods, governor of the State of Oregon, do hereby certify that this plat or map of The Dalles Military Road has been duly filed in my office by The Dalles Military Road Company, and shows, in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an act of Congress approved February 25, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City on the Columbia river, to Fort Boise on the Snake river," and with the act of the legislative assembly of the State of Oregon, approved October 20, 1868, entitled "An act donating certain lands to Dalles Military Road Company." I further certify that I have made a careful examination of said road since its completion and that the same is built in all respects as required by the said above-recited acts, and that said road is accepted.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon. Done at Salem, Oregon, June 23, 1869.

GEO. L. WOODS.

Attest: SAMUEL E. MAY,
[SEAL.] *Secretary of State.*

That on the thirty-first of May, 1876, The Dalles Military Road Company, for a valuable consideration, to wit, the sum of $125,000, to it paid by Edward Martin, of San Francisco, in the State of California, sold and conveyed all the said lands belonging to it to said Edward Martin, his heirs and assigns.

That by sundry mesne conveyances from the said Edward Martin to the Eastern Oregon Land Company, one of these defendants, the title to said lands became and now is vested in said Eastern Oregon Land Company.

*Second Plea.*

And for a second amended plea filed by leave of the court, these defendants say:

That on June 23, 1869, the governor of Oregon certified that the plat or map of the Dalles military road had been duly filed in the executive office; that it showed the location of the line of route upon which said road was constructed in accordance with the requirements of the act of Congress approved February 25, 1867, entitled "An act granting land to the State of Oregon to aid in the construction of the military wagon road from Dalles City on the Columbia river to Fort Boise on the Snake river," and with the act of the legislative assembly of the State of Oregon, approved October 20, 1868, entitled "An act donating certain land to the Dalles Military Road Company."

And the governor of Oregon then further certified that he had made a careful examination of said road since its completion, and that the same was built in all respects as required by the said above-recited acts, and was then accepted, as will more fully appear by the fifth (5) paragraph of the said bill of complaint.

That on December 18, 1869, the Commissioner of the General Land Office withdrew from sale the odd-numbered sections within three miles from each side of the said road in favor of The Dalles Military Road Company.

That Congress by an act approved June 18, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands had been granted by Congress to the State of Oregon to aid in the construction of certain military wagon roads, and the certificate of the governor of Oregon should show that any such road has been constructed and completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands, unless the State should by public act have transferred its interest in such lands to any corporation, in which case the said lands were to be patented to such corporation, as will more fully appear by the eleventh (11) paragraph of the bill of complaint.

That Edward Martin, then a resident of San Francisco, in the State of California, placing confidence of the truth of the certificate of the governor of the State of Oregon, dated June 23, 1869, that the said road had been duly constructed according to the requirements of the said act of Congress approved February 25, 1867; and also placing confidence in the order of the Commissioner of the General Land Office, dated December 18, 1869, withdrawing the said lands from sale in favor of The Dalles Military Road Company; and also believing that the said act of Congress approved June 18, 1874, would be carried into effect by issuance of patents to The Dalles Military Road Company for all of said lands, did, on the thirty-first day of May, 1876, purchase in good faith for a valuable consideration, to wit, the sum of $125,000, then paid by said Edward Martin to said Dalles Military Road Company, all the lands embraced in the grant to said company, except such portions thereof as had been previously sold by it. That previous to the time of paying the sum of $125,000 purchase money, and receiving said deed, the said Edward Martin had no notice of any failure on part of The Dalles Military Road Company to construct and complete the said road, in accordance with the requirements of said act of Congress approved February 25,

1867, and he had no reason to believe that the same was not constructed in accordance with the said act of Congress, but, on the contrary, he was informed and believed that said road had been constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road.

That thereupon the said Edward Martin became and was the *bona fide* purchaser, for a valuable consideration, of all said lands then owned by The Dalles Military Road Company, which were then conveyed to him by said corporation, as will more fully appear by its deed, a copy of which is attached to the bill of complaint, marked "Exhibit B," and dated May 31, 1876.

That the said Edward Martin afterwards, to wit, on January 31, 1877, executed and delivered to D. V. B. Henarie, one of the defendants, a deed of trust, wherein he acknowledged that said D. V. B. Henarie was the owner of the undivided fourth of all the lands mentioned and described in said deed of The Dalles Military Road Company to said Edward Martin, and that he held the same in trust for said D. V. B. Henarie, which deed of trust was recorded in Wasco County, State of Oregon, on May 7, 1884, in volume A, page 265, in miscellaneous records; also in Baker County, Oregon, on May 10, 1884, in volume 2, page 317, in record of leases and agreements; and also in Grant County, Oregon, on May 27, 1884, in book A, page 584, of miscellaneous records.

That when said Edward Martin purchased said lands on May 31, 1876, as hereinbefore stated, said D. V. B. Henarie paid the one-fourth of the consideration for the same, to wit, one-fourth of $125,000. That he made said purchase in good faith, relying upon the certificate of the governor of Oregon that said road had been constructed according to the act of Congress approved February 25, 1867, and also relying upon the act of Congress approved June 18, 1874, that patents in due form of law would be issued to The Dalles Military Road Company for said lands. That he had no notice at the time he paid one-fourth of said purchase-money and when said deed was executed and delivered to said Edward Martin, that said road had not been constructed and completed by The Dalles Military Road Company, as required by said act of Congress of February 25, 1867.

That afterwards, to wit, on the twelfth day of May, 1880, the said Edward Martin died intestate in the city of San Francisco, in the State of California, leaving a widow, the defendant, Eleanor Martin, and leaving as his heirs at law Thomas S. Martin, Edward Martin, and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, who were then minors.

That in March, 1882, the interest of said minors in said lands was sold at a guardian's sale by order of the county court of Wasco County, Oregon, at which sale the interest of said minors in said lands was purchased in good faith for a valuable consideration by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear by "Exhibit C," attached to the bill of complaint. That on August 3, 1882, the said James Phelan sold his interest in said lands to Peter Donahue, as will more fully appear by "Exhibit D," attached to the bill of complaint.

That on the eleventh day of August, 1884, all the heirs of said Edward Martin, and all persons who held an interest by purchase in said lands, to wit, P. J. Martin, Eleanor Martin, D. V. B. Henarie, Peter Donahue, Edward Martin, James V. Martin, Thomas S. Martin, Genevieve E. Walker, and Joseph W. Winans, sold, and by deed conveyed all their interest in the said lands and land grant to the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California, having its office in the city of San Francisco, in the State of California, as will more fully appear by "Exhibit E," attached to the bill of complaint.

That the Eastern Oregon Land Company now holds the legal title to all the said lands granted to The Dalles Military Road Company, except such as have heretofore been sold and conveyed by The Dalles Military Road Company and its grantees and the said Eastern Oregon Land Company.

All which matters and things these defendants do aver to be true, and they plead the said matters in bar to the plaintiff's bill of complaint, and pray the judgment of this honorable court whether they ought to be required

to make any other or further answer to said bill, and pray to be hence dismissed with their costs and charges wrongfully sustained.

JAMES K. KELLY and
A. L. FRAZER,
*Solicitors for Defendants.*

**The Question at Issue.**

The only question to be tried upon an issue presented by a replication to a plea in equity is the truth of the plea.

"If the plaintiff reply to the plea he thereby makes as full an admission of its validity as if it had been allowed upon argument, so that if the defendant at the hearing proves his plea to be true, the bill must be dismissed."

1 Daniels' Ch. Pr., 695.
Daws *v.* McMichael, 6 Paige, 139.
Fish *v.* Miller, 5 Paige, 26.
Hughes *v.* Blake, 6 Wheat., 453, 472–3.
Rhode Island *v.* Massachusetts, 14 Peters, 210, 257.

*The First Plea.*

The first plea is what is termed a *negative plea*, that is, it is based on the denial of a material allegation in the bill. The bill alleges in paragraph V that "the officers, stockholders, and agents of The Dalles Military Road Company and other persons acting in their interest and in the interest of the said company, falsely and fraudulently represented to George L. Woods, then the governor of Oregon, that said road had been constructed as

by law required, they, the said officers, stockholders, agents, and other persons aforesaid, then and there knowing that said representations were false and that the said road had not been constructed according to law or at all."

The plea admits that the governor did issue the certificate setting forth the construction of the road, dated June 23, 1869, but it denies that the same was issued through any false or fraudulent representation of the officers, stockholders, or agents of The Dalles Military Road Company, or any other person or persons in its interest.

As before stated this is a *negative plea*, denying the fraudulent representations alleged in the bill, and in such case it is necessary for the plaintiff to prove the truth of its allegations in order to render the plea ineffectual. It is not necessary for the defendants to prove the negative of the issue.

"The plaintiff must prove fraud if the plea denies that there was fraud in the transaction."

1 Daniels' Ch. Pr., 698, 837;
Eyre *v.* Dolphin, 2 Ball & B., 305;
Saunders *v.* Leslie, *Id.*, 515.

While it does not devolve on these defendants to prove the negative of the issue in its plea, yet so far as a negative can be proved, it has been done.

C. N. Thornbury, who was secretary of The Dalles Military Road Company at the time the deed was made to Martin, and an old resident of The Dalles, testified as follows:

"Q. 17. Had there been at that time any public talk or claim of fraud in this matter of the governor's certificate of construction of the road to your knowledge?

"A. Not to my knowledge.

"Q. 18. Would you be likely to have heard if there had been any such talk?

"A. I think so."

See deposition of Thornbury, printed Record, p. 173.

He further testified as follows:

"Q. 34. Did any one at the time of this sale to Mr. Martin, or prior thereto to your knowledge, question the validity of the title of The Dalles Military Road Company, or was there any suspicion of fraud in procuring the governor's certificate or in any of the transactions of the company up to that time?

"A. Not to my knowledge.

"Q. 35. What opportunity had you of knowing of any such question of the validity of the title, or suspicion of fraud if there had been any such?

"A. I resided in that country, and hear a great deal of the talk of the country and if there had been any talk of that kind, I would be liable to hear it."

Thornbury's testimony, printed Record, p. 175.

To the same effect is the testimony of William Grant, 28, p. 221, who was secretary of The Dalles Military Road Company at the time the road was built and the governor's certificate issued; P. J. Martin, 28, p. 189; D. V. B. Henarie, D. P. Belknap, and other witnesses. They all testify that they had no knowledge nor heard of any intimation that fraud had been perpetrated in procuring the certificate from the governor of Oregon as to the completion of the road.

As stated before, however, the burden of proving fraud is upon the plaintiff, where it is alleged in the bill and denied in a negative plea.

It is contended by counsel for complainant that the pleas and answer admit that the governor was induced to issue the certificate of the completion of the road by false and fraudulent representations.

The plea certainly asserts positively that the governor issued said certificate without any false or fraudulent representations having been made by The Dalles Military Road Company, its officers, stockholders or agents, or by any one acting for it or in its behalf, and that he was not induced to issue the certificate by any fraud or misrepresentations on their part.

The answer filed in support of the pleas denies any knowledge or notice on the part of these defendants of any such fraud or of any false or fraudulent representations having been made by any one.

It should be borne in mind that the defense here is the matter set up by the pleas. The answer is no part of the defense; and while the plaintiff is entitled to any admissions that may be contained in the answer on the trial of the pleas, it is too late now to complain that the answer is not sufficient. If the answer is not full enough plaintiff should either have excepted to it or to the pleas.

1 Daniels' Ch. Pr., 624;

Bogardus *v.* Trinity Church, 4 Paige, 178.

There is certainly no admission in the answer contrary to the statements set up in this plea.

After the defendants had taken their testimony and rested, upon the issues arising upon the pleas and replication, the counsel for the Government offered to prove the non-construction of the road, and that the certificate of the governor of Oregon, as to the completion of the same, was procured by fraud and false representation. The counsel for the Government then called as a witness Ad. Edgar and asked the following question:

"State fully and at length all you know as to whether or not the wagon road known as the 'The Dalles Military Road,' referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done in reference thereto; and state fully also all that you know in reference to the way that the certificate of the governor of Oregon, that said road or portion thereof had been built, was obtained."

Counsel for the defendants objected to the evidence offered as to the non-construction of the road as immaterial and not pertinent to the issues raised by the pleas and replication, and to the evidence offered as to fraud and false representation used to procure the said certificate of the governor for the same reasons, unless it could be shown that the fraud or false representation *were used by the defendant, The Dalles Military Road Company, its officers, stockholders or agents, or by some one for it or in its behalf.*

The commissioner who took the testimony certified the matter and the objection to the court for its decision, and

the objections were sustained. No other evidence was offered by counsel for the Government upon the issues made by the pleas and replication.

The first plea, then, must be considered as proven and as true. And the law is that where a plea has been proved to be true after the filing of a replication to it, then the bill must be dismissed.

See authorities cited, *ante*, p. 16.

*Second Plea.*

The second plea of defendants, D. V. B. Henarie, Eleanor Martin, P. J. Martin, and the Eastern Oregon Land Company, is that the lands purchased by Edward Martin, deceased, from The Dalles Military Road Company, and the subsebuent sales by which said lands become vested in the Eastern Oregon Land Company, were purchased in good faith, for a valuable consideration, and without notice of the fraud charged in the bill.

The pleadings show that the governor of the State of Oregon, who was authorized by said act of Congress to decide when the road was completed, did so decide on June 23, 1869, and certified fully and positively, that he had examined said road, and that it was so completed. That on the eighteenth day of June, 1874, Congress passed an act authorizing patents to be issued for these lands, where the certificate of the governor showed that the road was completed; and that patents were issued to The Dalles Military Road Company for a large part of these lands.

The evidence shows further that before purchasing the lands Martin had an abstract of the title made by competent men, and procured the opinion of learned attorneys as to the validity of the title, and that he and his associates took every reasonable precaution to find whether or not the title was good. The evidence further shows that Martin was a careful and conservative business man, and that during all the negotiations for the purchase of the land, and up to the time the last of these deeds was made, neither Martin nor his associates nor any of the subsequent holders or purchasers of this land had any knowledge or notice or suspicion that the road was not constructed as required by act of Congress, or that there was any fraud in its construction or in procuring the governor's certificate that it was constructed; and that no claim was made by anyone either to them or to any other person that the United States or any person or corporation other than The Dalles Military Road Company and its grantees had or made any claim to the ownership of any of these lands or any part of them.

The following is a portion of the testimony relating to the purchase of the land from The Dalles Military Road Company by Edward Martin, deceased, and James Phelan, of San Francisco.

*The Amount of Purchase Money Paid.*

From the testimony of D. V. B. Henarie.

In answer to general interrogatory No. 18, he says:

"Edward Martin attended personally to all matters of negotiation in making this purchase, looked into the

title and so on. I know that he employed Winans & Belknap to make an examination of the title when we purchased from The Dalles Military Road Company, and that he relied upon their opinion in the matter, and had not the slightest doubt that there was any question as to the title to this land grant being a good one, and he so assured me; otherwise I should not have invested my money in it. We acted in perfect good faith in the whole transaction, and believed the title to be a perfect one. I personally attended to the payment of most of one-half the drafts drawn upon Edward Martin and James Phelan by P. J. Martin in connection with this matter. I have here the drafts aggregating $120,550, which was the amount furnished by Edward Martin and myself and James Phelan in January, February, and March, 1875, to make the purchase of this land grant, and afterwards we paid several thousand dollars more in connection with the purchase. These are the original drafts."

The drafts are introduced and marked by the commissioner, Exhibit "A." (Printed Record, p. 150.)

From the testimony of P. J. Martin (printed Record, p. 186):

Q. 4. State what, if any, connection you have had with the purchase of said lands being the lands described in the bill herein at that time.

A. I purchased the lands in the winter of 1874 and '75 for him and James Phelan, of San Francisco, each purchasing a half.

Q. 5. Did you act as their agent in the matter?

A. I did.

Q. 6. Just state fully how you came to make the purchase for them and what was done in the matter.

A. In the summer of 1874 I happened to go from here to San Francisco, and while there my brother and James Phelan asked me to see them in relation to those lands. He asked me if I knew anything about them. I told them no, and they told me they were about to purchase them, they were looking into the matter; and upon my return to Oregon, having business in Eastern Oregon I

took a trip over the road for a certain distance out of curiosity, not knowing that they were to buy them at the time—not knowing they were going to buy them. They wrote me soon afterwards about the property, and I answered them that I had been up to the Dalles and taken a run out over the property a certain distance, about 40 miles, and that what I had seen of it was very nice land, very nice property, and that was all I wrote them at that time. I should have stated that while in San Francisco they had a report of the property from a chief engineer and expert who had been over it.

Q. 7. Do you remember his name?

A. His name, I think, was Kidder; he was a railroad man.

Q. 8. Now proceed, Mr. Martin, and tell what was done afterwards.

A. Well, they determined to buy, and I acted as their agent in the purchase. I employed ex-Governor Currey, of this State, at the time, to go to the Dalles and investigate into the affairs of the company, and purchase some of the stock in the company. While there the river froze up, and it was, of course, impossible to get to the Dalles, so he remained there all winter and looked into the affairs of the company, and reported to me that everything was correct and I purchased the stock. I purchased the land from the respective owners, and paid them for it.

Q. 9. In what way did you make that purchase?

A. I bought from individuals.

Q. 10. You mean you bought the stock of The Dalles Military Road Company from individuals?

A. Yes, sir.

Q. 11. Why did you take that method of acquiring the land.

A. Well, they endeavored to buy the land—did not want the stock—wanted to buy the land, but found it was necessary to take the stock also, to make it legal, and clear and perfect.

Q. 12. Did you acquire the title to all the stock in The Dalles Military Road Company?

A. I did.

Q. 13. How much did you pay for that stock?

A. A little over $125,000.

Q. 14. Did you pay that money yourself?

A. Most of it; in money and in drafts on the parties in San Francisco, my brother and Mr. Phelan.

Q. 15. In whose name was this stock taken then?

A. In mine.

Q. 16. For yourself, or for your brother and Mr. Phelan?

A. For my brother and Mr. Phelan.

Q. 17. When was this?

A. It was in the spring of 1873. I think it was in May, somewhere along there.

Q. 18. What was then afterwards done in the matter to perfect the title in your brother and Mr. Phelan, or either of them?

A. Well, after they transferred to me, we elected a new board of directors in The Dalles Military Road Co., of which I was elected president, and soon afterwards we executed a deed to Edward Martin, and I signed the same as president.

*The Purchase was in Good Faith.*

The following testimony shows that the purchase made by Edward Martin and James Phelan was made in good faith.

C. N. Thornbury testified as follows (R., p. 172):

Q. 7. Into whose hands was it transferred, or to whom was it sold?

A. The property was sold to Edward Martin, of San Francisco.

Q. 8. Do you know what the consideration paid by Mr. Martin was on that sale?

A. The consideration was one hundred and twenty-five thousand dollars.

Q. 9. Do you know whether or not a deed was made from the company to Mr. Martin?

A. There was a deed made by the company to Edward Martin.

Q. 10. About what date?

A. The deed is dated May 31st, 1876.

Q. 11. State if you know whether Mr. Edward Martin purchased that land in good faith?

A. Yes; Mr. Edward Martin purchased that land in good faith.

Q. 12. State if, to your knowledge, Mr. Edward Martin at or prior to the time of his purchase of this land, had any knowledge of any fraud in procuring the governor's certificate set out in the bill herein, or any knowledge that there was any fraud in the construction of The Dalles Military Road, or that this road was not constructed, or any information that would lead him to suppose that there was any such fraud or want of construction or any means of acquiring such information?

A. He had no such information to my knowledge.

Q, 13. Were you pretty well acquainted in the neighborhood of The Dalles along the line of the Dalles military road at that time?

A. I was. I had resided in Grant County before that time on the line of this road.

Q. 14. I think you said your business there had been post trader or merchandising?

A. I was post trader at Camp Watson and also had mercantile business in Canyon City.

Q. 15. You may now state if, to your knowledge, at the time of the purchase by Mr. Martin any other person or corporation made any claim to these lands deeded by The Dalles Military Road Company to Mr. Martin, or whether at that time, to your knowledge, the United States was making any claim to the land?

A. There was no other claim to the land than that of The Dalles Military Road Company, to my knowledge.

Q. 16. Had there been at that time any public talk or claim of fraud in this matter of the governor's certificate or construction of the road, to your knowledge?

A. Not to my knowledge.

Q. 17. Would you have been likely to have heard it if there had been such talk?

A. I think so.

P. J. MARTIN testified as follows (printed Record, 188):

Q. 21. What examination, if any, did you make or have made as to the title to these lands before purchasing?

A. We had an abstract furnished us, and that was submitted to our attorneys, and they passed the title as being perfect.

Q. 22. What attorneys were they?

A. Winans & Belknap, in San Francisco, and Mr. McGraff, or McGraw, who was prosecuting attorney for this State once.

Q. 23. Do you know upon what your brother and these attorneys relied in forming their opinion as to the title to these lands?

A. They relied upon the acts of Congress relative to these grants, and more especially that of 1874 as to the issuing of patents.

Q. 24. The act of 1874 authorized patents to be issued on these lands?

A. Yes; directly to the corporation.

Q. 25. Do you know whether the governor's certificate as to the construction of these roads constituted a part of this abstract or not?

A. It did.

Q. 26. Did the act of the legislature of Oregon transferring this grant to The Dalles Military Road Company also form a part?

A. Yes, sir.

Q. 27. Mr. Martin, prior to the time and at the time of your purchase of these lands for your brother and Mr. Phelan, as you have narrated, had you heard any claim or assertion that there was fraud in the construction of The Dalles Military Road, or in procuring the governor's certificate that the same had been constructed, or in procuring the President of the United States to patent part of these lands, or the Secretary of the Interior to list the same, or had you any information that would lead you to believe or suspect that there had been fraud in any of those acts?

A. None whatever. I never heard anything against the title, or anything different at the time, and I talked with a great many, and I certainly must have heard of it if there was such a report abroad. I never heard anything going about, or anything against the title.

Q. 28. Do you know whether or not your brother, Edward Martin, ever had any information of any fraud in any of these transactions, or any information that would

lead him to believe there was fraud in any such transactions, or whether Mr. James Phelan had any such information?

A. They certainly never did or they would not have paid that amount of money for the property; would not have paid that or any other amount.

*The Amount Paid for the Land was the Full Value of It.*

The greater portion of the land was of an inferior character, and sold for all it was worth. The following testimony shows its value.

William Grant (Record, p. 222) testifies as follows:

Q. 43. Are you familiar with the land embraced within this grant?

A. Yes.

Q. 44. Describe it.

A. It embraced every alternate section for three miles on each side of the road, commencing at the court-house in Dalles City, running through Wasco County, Grant County and Baker to old Fort Boise.

Q. 45. I mean describe it as to the character of the land; the kind of land it was?

A. The first ten miles of the grant was grazing land in its original shape. The next thirty miles of it is through a piece of good agricultural country, capable of raising cereals. The next hundred miles was through a rolling, rough, hilly country, chiefly valuable for stockraising and nothing else—only a few creek bottoms which would produce. The next thirty miles was through the John Day valley, which is good land; but two-thirds of it was taken up by settlers prior to the grant. The balance of the route is through a sage-brush country, and chiefly valuable for grazing purposes; some timber on it.

Q. 40. In the John Day valley where you say two-thirds of the land was taken up by settlers, what kind of land was then left for the company?

A. What did they get in lieu thereof?

Q. 47. Yes.

A. Well, they were allowed seven miles on each side of the three-mile limits to select lieus from, contiguous to the lands that they lost.

Q. 48. What was the character of the land generally they got in lieu of the agricultural land in the John Day valley?

A. Well, in selecting, they selected the best they could. They selected the best.

Q. 49. The best that was not taken up by settlers?

A. Yes.

Q. 50. What is the value of the land from the John Day valley on to the Snake—the comparative value of it?

A. One-half of it I would not pay taxes on if I had a deed to it; and the other half, take the average, would be worth about government price.

Q. 51. You mean in the whole grant through?

A. Oh, no; speaking of that particular part from the John Day valley out.

Q. 52. (Cross.) Do you mean $1.25 an acre?

A. Yes.

Q. 53. Taking the whole grant through, what proportion of it is arable land and subject to cultivation.

A. Oh, about one-eighth.

Q. 54. What was the price paid by Martin and his associates for this property?

A. About $120,000.

Q. 55. Was that a fair value for the land at that time?

A. It was more than any one else would have given for it, and I considered that it was well sold.

C. N. THORNBURY, testifies as follows (Record, p. 174):

Q. 25. Were you at that time acquainted with the lands along the line of this road within the limits of Grant County, The Dalles Military Road Company?

A. Yes, sir; as far as Canyon City. I have been over the body of the road since.

Q. 26. State whether or not the price paid, $125,000, was then the full value of the land or otherwise?

A. At that time it was a very big price for the land.

Q. 27. What is the character of the land along the road?

A. The character of the land—there is some very good agriculture land in spots, but the majority of it is very poor land, a very great majority of it.

Q. 28. What kind of land is it?

A. Well, the agriculture land is very good land. There is some very good pasture land and there is a great deal of very rocky, dry, worthless land.

Q. 29. What proportion does the arable portion of this land bear to the rocky, worthless part?

A. I think there is not to exceed one-tenth of the land that is arable.

P. J. MARTIN testifies as follows (Record, p. 192):

Q. 71. How much of this land did you examine before purchasing the stock?

A. I went out to a place called Grass Valley, a big day's drive, and back again.

Q. 72. Have you since that time examined the remainder of the land?

A. A great part of it.

Q. 73. Now please state what is the character of this land.

A. Well, it is pretty tough; about nine-tenths of it is not worth a damn, so to speak.

Q. 74. Was this $125,000, which you paid for the land, the full value of the land at that time?

A. It was a great deal more than the value of it, as we learned afterwards, when we came to find out.

Q. 75. What kind of land is it? Just describe it.

A. Well, the most of it, I don't suppose you could get worse land on the top of God's earth. I think that is a notorious fact to everybody.

Q. 76. Is it mountainous?

A. Mountainous—yes, and a desert.

James Phelan testifies as follows (Record, p. 160):

In answer to interrogatory 11.—Have you ever, before or since the purchase, examined this land? If so, describe

it; state whether it is level or mountainous, and what proportion of it is rocky and what portion is susceptible of cultivation.

The witness answers.—Yes; since the purchase I have been all over the land; the bulk is mountainous and rocky; a very small portion of it is susceptible of cultivation.

In answer to interrogatory 12.—Was the price paid to The Dalles Road Company for the land the full value of the land at that time, or otherwise?

The witness answers.—I consider that we paid a great deal more than it was worth at that time.

To the general interrogatory:

The witness answers to interrogatory 16.—So far as I am concerned, I know that I purchased the property in connection with Edward Martin in perfect good faith, being satisfied that the title was perfect, and believing that the land was worth what it cost. I believe that Mr. Edward Martin had the same opinion of the title and the value of the property. But on a thorough and careful examination of the property in 1876, some time after I had bought it and paid my money, I became disgusted and determined to get rid of it, for the reason that I, in my opinion, deemed it worthless to hold as an investment. I came to this conclusion after spending six weeks of my time in examining the property, crossing and recrossing it at different points and in all directions, from beginning to end.

*The purchasers of the land from The Dalles Military Road Co. had no notice of any adverse claim to the same, and no knowledge that there was any fraud in procuring the grant from the United States.*

Eleanor Martin testifies as follows (Record, p. 204):

Q. 7. State whether or not to your knowledge Mr. Martin had any notice of any fraud in the construction of the road of The Dalles Military Road Company, or in procuring the governor's certificate when such road was constructed?

A. He never had any such notice, and he never had any doubt then that there was anything at all except that it was a perfect title; it had the signature of the governor of Oregon. He never thought of such a thing.

Q. 8. Did he ever have any notice of any fraud or any information that would lead him to suspect there was any fraud in procuring these lands to be listed by the Secretary of the Interior, or part of them to be patented by the United States, to your knowledge?

A. He never did, never; he had full faith in the validity of the title from what he was told at the time.

William Grant testifies as follows (Record, p. 221):

Q. 28. At the time of this sale, or prior thereto, did you have any knowledge of any fraud having been perpetrated by The Dalles Military Road Company in the construction of their road, or in obtaining the governor's certificate to its construction and completion, or in geting the Secretary of the Interior to list any part of the lands, or obtaining patents for any part of the lands?

A. No, sir.

Q. 29. Did you have any reason to suspicion that fraud had been used in any of these matters?

A. No, sir.

Q. 30. Was there at that time any other party or parties claiming title to this land besides The Dalles Military Road Company?

A. No, sir; unless there was an occasional settler that claimed a prior right to the company.

Q. 31. That was only in cases where there was a question as to priority?

A. Priority of claim.

Q. 32. But as to the body of the grant did the United States at that time claim title to it, or dispute the title of The Dalles Military Road Company?

A. No, sir; nor no one else.

Q. 33. Did Edward Martin at that time, or P. J. Martin, or ex-Governor Curry, as agents, to your knowledge have any knowledge of any fraud having been used in obtaining this grant, or in any matter connected with it?

A. No, sir.

The foregoing extracts from the testimony clearly establish these facts:

That the purchase-money paid for the land by Edward Martin was $120,550.

That the amount of the purchase-money so paid was the full value of the land.

That the purchase was made in good faith.

The evidence shows that before purchasing the lands Martin had an abstract of the title made by competent men, and procured the opinion of learned attorneys as to the validity of the title, and that he and his associates took every reasonable precaution to find whether or not the title was good. The evidence further shows that Martin was a careful and conservative business man, and that during all the negotiations for the purchase of the land, and up to the time the last of these deeds were made, neither Martin nor his associates, nor any of the subsequent holders or purchasers of this land, had any knowledge or notice or suspicion that the road was not constructed as required by act of Congress, or that there was any fraud in its construction or in procuring the Governor's certificate of construction; and that no claim was made by anyone either to them or to any other person that the United States or any person or corporation other than The Dalles Military Road Company and its grantees had or made any claim to the ownership of any of these lands or any part of them.

No attempt was made by the attorneys for complainant to contradict or disprove the foregoing testimony. It is true when defendants concluded examining their witnesses the attorneys for complainant called a witness and asked him the following question:

"State fully and at length all you know as to whether or not the wagon road known as 'The Dalles Military Road,' referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done in reference thereto; and state fully also all that you know in reference to the way that the certificate of the governor of Oregon that said road or portion thereof had been built was obtained."

Objection was made to this question, and the objection sustained by the court, for the reason that whether the road was constructed or not was not an issue made by the plea and replication.

This ruling was clearly right, because the second plea does not allege that the road was constructed, and if it was necessary that defendants should have averred the construction of the road in order to make the plea sufficient in law as a defense, then counsel for complainant ought to have set the plea down for argument instead of replying to it. *The replication is an admission of the sufficiency of the facts pleaded as a bar if true.*

"Where a defendant in a plea of purchase for a valuable consideration *omitted to deny notice*, and the plaintiff replied to it, and the defendant at the hearing proved the purchase for a valuable consideration, it was held that the bill ought to be dismissed, for it was the *plaintiff's* own *fault* that he had not set down the plea for argument, when it would have been overruled."

Harris *v.* Ingledew, 3 P. Williams, 94;
1 Daniels' Ch. Pr., 695.

Even if there had been a fraud perpetrated by The Dalles Military Company in failing to construct its road (which has not been proven), yet the defendants who pur-

chased the land in good faith for a valuable consideration, without notice of any fraudulent transactions, will be protected.

In Colorado Coal Co. *v.* United States, 123 U. S., 313, the court said:

"It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value without notice is perfect."

## What was the Effect of the Governor's Certificate?

By the act of March 2, 1889, the court is authorized to determine the question, what is *the legal effect of the several certificates of the Governors of the State of Oregon?*

The first plea having been proved to be true, the title of The Dalles Military Road Company became perfect, and consequently the Eastern Oregon Land Company, defendant, has a good title independent of its rights as a purchaser in good faith.

The only one authorized by the acts of Congress to decide when the roads were completed was the governor of Oregon, and his certificate of completion was the only evidence of that fact and the only authority for the corpo-

rations to sell the lands. From the decisions of the governor on this fact of completion there was no appeal, and necessarily his decisions were final and conclusive. The United States having clothed the governor with authority to decide and certify to the fact of construction and completion of the roads, and authorized the land to be sold upon such certificates, can not go behind his acts so far as to destroy or take away the vested rights of innocent purchasers. On the contrary, the Government is estopped by the acts of its constituted agent.

In *United States* v. *Arredondo* (6 Peters, 729), the Supreme Court says:

"It is a universal principle that where power or jurisdiction is delegated to any public officer, or tribunal, over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special."

The same principle was enunciated in *Reichart* v. *Felps* (6 Wall., 160). In that case the governor of the Northwest Territory was authorized by an act of Congress to examine the claims of the ancient settlers who were in possession of lands at the beginning of the revolution, and confirm them in the possession. Under this authority, Governor St. Clair issued a document, somewhat in the form of a land patent, to one Jarrot, confirming to him in fee a tract described.

Afterwards, on February 12, 1812, Congress passed an act authorizing a board of commissioners to revise and re-examine the confirmations made by the governor. Upon their report the Jarrot claim was rejected by the proper officers of the Government, and the land previously confirmed to Jarrot was sold at public sale to Reichart, and a patent issued to him. The Supreme Court declared this patent void, and confirmed the Jarrot title. It held that Congress had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agent of the Government.

In United States *v.* Speed, 8 Wall., 83, the principle here involved came before the Supreme Court in a case where a government officer had decided, under the *implied* authority given by the act of March 2, 1861 (12 U. S. Stats., 220), that an exigency existed which dispensed with advertising for government supplies.

In holding that the decision of the officer was *final* and *conclusive*, no matter how erroneous, the court says (p. 83):

"It is too well settled to admit of dispute at this day, that where there is a discretion conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

## Defense of the Defendant, Dalles Military Road Company.

The Dalles Military Road Company, the principal defendant, and the one against whom all the allegations of fraud are made, filed an answer to the bill of com-

plaint on October 25, 1889, denying all the material allegations of the bill, and setting forth the full and complete construction of the road without any fraud, and the manner of its construction.

The following is the full answer of the defendant, Dalles Military Road Company, and of James K. Kelly, its president, and C. N. Thornbury, its secretary, filed October 25, 1889, in the regular order of proceedings in the Circuit Court (see Record, 75).

*In the Circuit Court of the United States for the District of Oregon.*

THE UNITED STATES, Plaintiff,
*vs.*
THE DALLES MILITARY ROAD COMPANY, James K. Kelly, C. N. Thornbury, Eleanor Martin, P. J. Martin, D. V. B. Henarie, Mary A. Henarie, T. J. Martin, Margaret A. Martin, James V. Martin, Thomas S. Marton, Ada B. Martin, Edward Martin, Barton L. Walker, Genevieve E. Walker, and the Eastern Oregon Land Company, Defendants.

*To the Honorable, the Judges of the Circuit Court of the United States for the District of Oregon:*

The answer of The Dalles Military Road Company, and of James K. Kelly, president, and C. N. Thornbury, secretary of said company, to the bill of complaint of the United States, plaintiff.

These defendants now, and at all times hereafter, saving to themselves all, and all manner of exceptions or otherwise that may or can be taken to the many errors, uncertainties, and imperfections in the said plaintiff's bill contained, for answer thereto, or to so much thereof as these defendants are advised it is necessary or material for them to make answer to, answering, say:

In answer to paragraph I of the said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph II of the said bill, these defendants admit that all the allegations therein contained are true.

In answer to paragraph III of said bill, these defendants admit that all the allegations therein contained are true; but they deny that the said act of the legislative assembly of the State of Oregon, approved October 14, 1862, had any application to the manner of constructing the wagon road of The Dalles Military Road Company.

In answer to paragraph IV of the said bill, these defendants admit that all the allegations contained therein are true.

In answer to paragraph V of the said bill, these defendants admit that the Governor of Oregon, on the 23d day of June, 1869, made and executed the certificate copied in the said paragraph, but they say they have no knowledge whatever of any false or fraudulent representations charged in the said paragraph in connection with the procuring of said certificate from the governor of Oregon. And these defendants believe that neither on the first day of January, 1869, nor on divers days between that day and the 23d day of June, 1869, nor at any other time, the officers, stockholders, or agents of The Dalles Military Road Company, or any one of them, or any other person or persons acting in their interest, falsely or fraudulently represented to George L. Woods, then the governor of Oregon, that said road had been constructed as by law required; or that they, the said officers, stockholders, agents, and representatives, or any one of them, or any other person or persons, then or at any time knew that any such representations were false, or that the said road had not been constructed according to law. And these defendants believe that no such false or fraudulent representations as are alleged in said paragraph were ever made by any one of said officers, stockholders, agents, or representatives of The Dalles Military Road Company, or by any person in its behalf, for the purpose of fraudulently procuring from the said George L. Woods, governor of Oregon, any certificate declaring that the said road had been constructed in accordance with the said act of Congress, approved February 25, 1867, and the said act of the legislative assembly of the State of Oregon, ap-

proved February 20, 1868. And these defendants deny that the certificate of George L. Woods, governor of Oregon, a copy of which is set forth in paragraph five of said bill, was made through any false or fraudulent representations by the officers, stockholders, or agents of The Dalles Military Road Company, or by any person or persons in its interest as alleged in paragraph five of said bill.

In answer to paragraph VI of said bill, these defendants deny the allegations contained therein that The Dalles Military Road Company had not at any time whatsoever constructed or caused to be constructed a road upon any line of route located or surveyed by said company or any other corporation, person or persons, anywhere within the limits of the grant of land provided in the act of Congress aforesaid; and, on the contrary, they say that The Dalles Military Road Company had on and prior to the said 23d day of June, 1869, a road upon the said line of route, located and surveyed by said company within the limits of said grant of land, completed from Dalles City on the Columbia River to Fort Boise on Snake River, and constructed according to the requirements of the act of Congress approved February 25, 1867, with such width, gradation, and bridges, as to permit of its regular use as a wagon road.

That the said road was made in the following manner: On June 15, 1863, articles of incorporation were filed in the office of the county clerk of Wasco County, Oregon, to incorporate "The Dalles and Boise Road Company" for the purpose of constructing a wagon road from Dalles City, in Wasco County, to the Boise mines, in Idaho Territory, with a capital stock of $20,000, divided into four hundred shares of $50 each. Said company was organized by the subscription of the capital stock and the election of a board of directors, who soon thereafter proceeded to construct said road, commencing at a place known as Cross Hollows, on the line of route toward Canyon City. That said company contracted with different persons to make portions of said road between Cross Hollows and Canyon City, by way of Camp Watson; and with other parties to make that portion of it from Canyon City to Snake River. That as early as the fall of 1864 The Dalles and Boise Road Company had made a pass-

able road so as to enable teams of horses and wagons to go over it and haul freight from Cross Hollows to Canyon City, a distance of about one hundred and forty miles.

The said Dalles and Boise Road Company continued to work on said road, and improve its condition, until 1866, and expended upon it all the available capital of said company, as well as all the tolls collected from persons passing over said road with teams, carrying freight, coaches, and other vehicles. That in 1866 the said company became financially embarrassed, and judgments were obtained against it for work and labor done on the said road and supplies furnished, and for provisions for workmen, tools, and other necessary supplies.

That on July 1, 1865, Howe & Booth obtained a judgment against said company in the Circuit Court for Wasco County for $445.25 and $73.69 costs.

That on February 5, 1867, Block & Miller obtained a judgment against said company in the county court of Wasco for $291.74-100.

That on June 10, 1867, W. G. Colby obtained a judgment in the Circuit Court for Wasco County for $118.32 and costs.

That on October 7, 1867, Wait and Kelly obtained a judgment in the county court of Wasco County for $182.80 and costs.

That there were divers other small claims against The Dalles and Boise Road Company, which it was unable to pay on account of its insolvent condition.

That on June 6, 1866, by virtue of an execution issued on the judgment of Howe and Booth to the sheriff of Wasco County, the said sheriff sold to N. H. Gates, J. R. Robbins, and C. S. Miller all that part of The Dalles and Boise road lying in Wasco County commencing at Cross Hollows and running thence east to the line between Wasco and Grant Counties, a distance of seventy-four (74) miles, more or less, for the sum of six hundred and five dollars ($605), subject to redemption.

That on May 25th, 1867, by virtue of an execution issued on the judgment of Block and Miller to the sheriff of Grant County, the said sheriff sold to Block and Miller all that portion of The Dalles and Boise Road lying in Grant County for three hundred and thirty-six dollars ($336), subject to redemption.

That on January 18, 1868, Kelly and Wait, being lien creditors, redeemed from sheriff's sale that portion of said road lying in Wasco County, sold for ($605) six hundred and five dollars, by paying to said sheriff the sum of eight hundred and ninety-three dollars ($893) for N. H. Gates, J. R. Robbins, and C. S. Miller, the purchasers at sheriff's sale.

That on the 18th of January, 1868, Victor Trevitt, the assignee of the said judgment of W. G. Colby, being a lien creditor, redeemed from sheriff's sale that portion of said road lying in Grant County sold to Block and Miller for three hundred and thirty-six dollars ($336), by paying to the sheriff the sum of three hundred and ninety dollars ($390) for said Block and Miller.

That soon after the said redemptions took place a compromise of all parties interested in the said road, whether as purchasers at sheriff's sales, or redemptioners, or persons having claims against The Dalles and Boise Road Company, was effected. And it was then agreed among them to reorganize the said company under a new name by increasing the capital stock to one hundred thousand dollars ($100,000) to be apportioned among the several parties interested, who were to become subscribers to the stock of the reorganized corporation. That in pursuance of this arrangement articles were filed on March 9, 1868, incorporating The Dalles Military Road Company with a capital stock of one hundred thousand dollars ($100,000); that on March 10, 1868, the full amount of stock was subscribed and the corporation duly organized.

That the road-bed of The Dalles and Boise Road Company and all its other property was then turned over to the newly organized corporation, and The Dalles Military Road Company commenced operations by levying assessments on the stockholders to raise funds to construct and complete its road; that a force of laborers was placed on that part of the road from Cross Hollows to Canyon City during the year 1868, and at the end of the year that portion of the road, consisting of one hundred and forty miles, was completed, so as to be a public highway, constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road.

Defendants further say that in 1864 and 1865 The Dalles and Boise Road Company did a large amount of work in the construction of that part of its road lying east of Canyon City and between that place and Snake River, and incurred indebtedness to John P. Booth and Thomas Howe, the contractors for building the same, which it was unable to pay in full. That an agreement was then entered into between said corporation and said Booth and Howe that it would lease to them that part of its road lying between Canyon City and Snake River for years with the privilege of collecting for their own use all the tolls to be charged for teams hauling freight, stages, coaches, and other vehicles, horses, mules, oxen, etc., and in consideration of this right and privilege granted to them by the said Dalles and Boise Road Company, the said Booth and Howe agreed to complete that part of said road and keep the same in repair as a wagon road fit for public travel. That this lease continued to remain in force until after the reorganization of that corporation under the name of The Dalles Military Road Company, as hereinbefore set forth.

That in March, 1869, The Dalles Military Road Company entered into a contract with Thomas Howe, one of said lessees, whereby it again leased to him all that part of said road lying between Canyon City and Snake River for another period of years, giving him the right and privilege of collecting and receiving for his own use all the tolls to be received thereon. That in consideration thereof, said Howe agreed to construct and to keep in repair that portion of said road, as required by law; and further agreed to allow all troops, property, and mails of the United States to pass over said road free from tolls or other charges. That said Thomas Howe, the lessee of The Dalles Military Road Company, did open, construct, and keep in repair that portion of said road lying east of Canyon City until long after the time when the governor of Oregon certified that said road was constructed as required by the said act of Congress, approved February 25, 1867.

That in March, 1869, The Dalles Military Road Company purchased from one Thomas Gordon the bridge across Des Chutes River, known as the Gordon bridge, in consideration of fifteen hundred dollars ($1,500); that

said bridge was about four or five miles above the mouth of said Des Chutes River, and was one of the best if not the very best crossings of that stream. That The Dalles Military Road Company made that bridge and the approaches to it a part of its road, and put in good order and condition the said approaches leading to the bridge on both sides of said river so as to permit of its regular use as a wagon road. That The Dalles Military Road Company then had a continuous road from Dalles City on the Columbia River to Fort Boise on Snake River, over which teams of eight or ten horses or mules, or five yoke of oxen, could and did pass the entire length of said road from The Dalles to Snake River, hauling as much as five tons of freight at a load. That it was constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road. And these defendants deny that when the governor of Oregon issued the said certificate declaring that said road had been constructed in accordance with the act of Congress approved February 25, 1867, he knew that it was not true.

And defendants deny the allegation in paragraph VI of the bill of complaint, that Geo. L. Woods, governor of Oregon, did not make a careful or any examination of any road constructed or owned by The Dalles Military Road Company, and on the contrary these defendants say that said governor well knew from a partial examination made by him, and by good and sufficient proof from reliable persons examined by him, that the said road was constructed in all respects as required by the act of Congress approved February 25, 1867.

In answer to paragraph VII of the said bill, these defendants say the said certificate was not procured by The Dalles Military Road Company through or by any false or fraudulent representations made by the said officers, stockholders, agents, or by any other person or persons in order to enable it to falsely or fraudulently obtain possession or control said lands lying within the limits of said grant; and deny that the acceptance by the governor of Oregon of said road belonging to The Dalles Military Road Company was a fraud upon the United States; and on the contrary they say that said road was constructed according to law, and was fairly accepted by the governor of Oregon as before stated.

In answer to paragraph VIII of said bill these defendants say that said road was constructed in whole throughout its entire length with such width, gradation, and bridges as to permit of its regular use as a wagon road, and so as to be a public highway, and permit the transportation of property, troops, and mails of the United States over the same; and defendant alleges that it was so used when said road was accepted by the governor of Oregon as a road completed according to the act of Congress approved February 25, 1867.

In answer to paragraph IX of said bill, these defendants say that in the construction of said road there was expended by The Dalles Military Road Company, and by its predecessor and assignor The Dalles and Boise Road Company, and by persons who constructed that portion of the same between Dalles City and Cross Hollows, and which was purchased from Thomas Gordon, as before stated, in all about eighty thousand dollars ($80,000); and that the lands granted to The Dalles Military Road Company in pursuance of the said act of Congress to aid in the construction of said road were applied to the reimbursement of the moneys so expended in the construction of said road.

In answer to paragraph X of said bill these defendants say that the lands granted by the said act of Congress were disposed of for the purpose of reimbursing The Dalles Military Road Company and its stockholders for the money expended in the construction of said road, as hereinbefore stated.

In answer to paragraph XI of said bill these defendants say the allegations therein contained are true.

In answer to paragraph XII of said bill these defendants say it is true that patents for a portion of the lands included in the grant made by said act of Congress were issued to The Dalles Military Road Company as alleged in the said bill, and it is believed that the number of acres specified in Exhibit A attached to the bill, to wit, 126,910.23-100 acres, is correct. But these defendants deny that on the 19th day of June, 1876, or at any other time, the President of the United States, or any other officer of the Government of the United States, was deceived, misled, or imposed upon by any false or fraudulent certificate, as alleged in the bill, and that he was

thereby induced to issue the said patents. And these defendants say the said patents were fairly and properly issued to The Dalles Military Road Company.

In answer to paragraph XIII of said bill these defendants admit that all the allegations therein contained are true.

In answer to paragraph XIV of said bill these defendants admit that all the allegations therein contained are true.

In answer to paragraph XV of said bill these defendants say that the same is not a correct statement of the length of said road; that the same was surveyed after its construction, to wit, between April 22 and May 17, 1869, by David P. Thompson, and the length of said road from the court-house in Dalles City to Fort Boise, on Snake River, was three hundred and thirty and one-half (330½) miles. This and the time when the said survey was commenced and ended appear by the certificate on the map of survey made by said D. P. Thompson. And this defendant denies that The Dalles Military Road Company inequitably claims the right to have a patent issued for all the lands embraced within said grant not already patented to it; but it does claim that patents should be issued to it for all of said lands, because it is justly entitled to such patent.

In answer to paragraph XVI of said bill these defendants say that neither any one or more of the defendants in this suit had full knowledge or had any knowledge whatever that the road provided for by said act of Congress approved February 25, 1867, had not at any time been constructed as required by the said act of Congress and the act of the legislative assembly of the State of Oregon approved October 20, 1868, so as to be in any sense whatever a public highway; or so that it could be used by the United States or by any of the citizens or residents thereof as a public highway, or so that the United States could transport its property, troops, or mails over the same. And they deny that they or any of them have full or any knowledge that no grades had been established; that no clearing had been done on any part thereof; no bridges built over any streams on the line thereof, and no cuts made and no turnouts constructed anywhere on the line of road by The Dalles Military

Road Company. And they deny that they or any of them had full or any knowledge that said road was not begun nor completed within five (5) years from the dates of the passage of said act of Congress approved February 25, 1867, or that it had never been constructed. And they deny that they or any of them well knew or knew at all that the statements made in the certificate of the governor of Oregon hereinbefore set forth were false, or that the governor did not, at any time whatever, examine the road referred to in his certificate, or that the said certificate had been procured by false or fraudulent representations, or that the patent aforesaid was found to be issued upon said false and fraudulently procured certificate or upon any false certificate. And defendants, further answering, say that said road of the Dalles Military Road Company was constructed over its entire length with such width, gradation, and bridges as to permit of its regular use as a wagon road; that soon after its reorganization, on March 9, 1868, the Dalles Military Road Company entered upon the work of completing portions of the said road which had been partially constructed by its predecessor, The Dalles and Boise Road Company, and constructing other portions of the same so as to facilitate travel thereon; that when the said road was examined and accepted by the governor of Oregon, as hereinbefore set forth, and certified by him to be constructed in accordance with the act of Congress approved February 25, 1867, and for more than a year before that time, large wagons loaded with from three to five tons of freight to each wagon, and drawn by three to five pair of horses or mules, and often by five or six yoke of oxen, would go from Dalles City to Canyon City, a distance of two hundred (200) miles; that in making these trips, as these teams frequently did, they would meet other similar teams returning from Canyon City, and pass them without difficulty or any unreasonable detention.

That all the goods, wares and merchandise used and consumed in the mining camps in and around Canyon City and its vicinity were hauled over the said road from Cross Hollows to Canyon City. That the goods, wares, and merchandise used by the farmers and other settlers along the line of said road to Canyon City, and for thirty

(30) miles beyond that town, were all transported on said road. That all the supplies used by the U. S. troops stationed at Camp Watson, Camp Harney, and Camp Logan, in Grant County (except such as were procured in the vicinity of said military posts), were hauled or packed over a great portion of said military road. That the United States mails were carried on said road from Cross Hollows to Canyon City in passenger coaches drawn by four horses, and made regular trips, sometimes twice and sometimes three times a week, and returned in the same way. And these defendants further say that from and after the time when The Dalles Military Road Company became entitled to the said grant of land by virtue of the act of the legislative assembly approved October 20, 1868, the said road has remained a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any and all property, troops, mails of the United States, and that no tolls were ever collected by The Dalles Military Road Company from the United States since the said 20th day of October, 1868.

And these defendants deny all and all manner of unlawful combination and confederacy with which they are charged in said bill, without this, that there is any other matter, cause or thing in the complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants, all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honerable court shall direct; and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

JAMES K. KELLY,
C. N. THORNBURY,
DALLES MILITARY ROAD CO.,
By JAMES K. KELLY,
*President.*

Attest:
C. N. THORNBURY,
*Secretary D. M. R. Co.*
JAMES K. KELLY &
A. L. FRAZER,
*Solicitors for Defendants.*

[SEAL OF THE D. M. R. CO.]

STATE OF OREGON, }
*County of Wasco.* } *ss.*

The answer of the defendant, Dalles Military Road Company, was taken this 24th day of October, 1889, before me under the common seal of the said corporation as by their said seal thereto attached appears.

B. S. HUNTINGTON,
*Commissioner of the Circuit Court of the U. S. for the District of Oregon.*

STATE OF OREGON, }
*County of Multnomah.* } *ss.*

James K. Kelly, one of the defendants above named, being duly sworn, on his oath says that the matters and things set forth in the foregoing answer, so far as it relates to his own acts, are true, and so far as it relates to the acts of others he believes them to be true.

JAMES K. KELLY.

Subscribed and sworn to before me this 23d day of October, 1889.

R. H. LAMSON,
*Clerk.*
By R. B. LAMSON,
*Deputy Clerk.*

STATE OF OREGON, }
*County of Wasco.* } *ss.*

C. N. Thornbury, one of the defendants above named, being duly sworn, on his oath says that the matters and things set forth in the foregoing answer, so far as it relates to his own acts, are true, and so far as it relates to the acts of others he believes them to be true.

C. N. THORNBURY.

Subscribed and sworn to before me this 24th day of October, 1889.

B. S. HUNTINGTON,
*Commissioner of the Circuit Court of the U. S. for the District of Oregon.*

[Indorsed]: Filed Oct. 25, 1889. R. H. Lamson, clerk.

No exceptions were filed to this answer of The D. M. R. Co. for insufficiency, as prescribed by equity rule No. 61, and therefore the answer was to be taken and deemed to be sufficient.

The plaintiff was then required by equity rule 66 to file the general replication on or before the next succeeding rule day. No such replication was ever filed. More than two years after the filing of the answer, to wit, on the 27th day of November, 1891, the attorneys of The D. M. R. Co. filed a motion to dismiss the bill as to that defendant, and it was accordingly dismissed by the Circuit Court on that day, under equity rule 66.

On December 2, 1891, the solicitors of complainant moved the court to set aside the order dismissing the bill as to said defendant, Dalles Military Road Co., and for leave to file a replication to its answer *if the replication already filed is held by the court not to apply as a replication to said answer.*

After argument this motion was denied by the court, with leave to make a further showing.

The solicitors for complainant claim that the replication filed June 13, 1891, was a sufficient reply to the answer of The Dalles Military Road Co. But this is not so. That replication was filed to the pleas and accompanying answer of the Eastern Oregon Land Co. The time for replying to the answer of The Dalles Military Road Co. had long gone by, and it could not be done without leave of court.

Even if the replication filed June 13, 1891, could be fairly construed as a replication to the answer of The Dalles Military Road Co., then the complainant has failed

to take any testimony in support of the allegations in its bill. By the provisions of equity rule 69, three months are allowed for taking testimony, and no more. So that after September 13, 1891, the case could only be heard upon bill and answer, if the replication filed June 13 was sufficient. Upon the bill and answer alone the bill should be dismissed.

JAMES K. KELLY,
*Solicitor for Appellees.*